SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
---x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and
JOANN DONOHOE,

Defendants.

---x

Index No. 21162/09

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AND COUNTY COURTS

**MEMORANDUM OF LAW IN SUPPORT
OF THE NATURE CONSERVANCY'S
MOTION TO DISMISS COMPLAINT**

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MEMORANDUM OF LAW IN SUPPORT OF THE NATURE CONSERVANCY'S MOTION TO DISMISS COMPLAINT

Preliminary Statement

Defendant The Nature Conservancy ("TNC") respectfully submits this memorandum in support of its motion to dismiss the Complaint.

The Complaint should be dismissed because it fails to state a cause of action known to or cognizable under New York law.

The Complaint alleges only that TNC (and the other defendants) have taken the "position" in another action that Plaintiff (also the plaintiff in that other action) does not have the easement rights over Oregon Road which Plaintiff claims to have. The Complaint in this action (Exhibit 1) alleges nothing other than that the Defendants in this action have defended themselves in a prior, and still pending, declaratory judgment action.

This is the second action that Plaintiff has commenced against these Defendants, but it is the third action commenced by Plaintiff concerning Oregon Road. In the first action, *Seven Springs, LLC v. The Nature Conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*"), Seven Springs seeks a declaration that it has an easement over a portion of Oregon Road in the Town of North Castle, including over land that is owned by TNC.

This action contains no substantive allegations that are not asserted in *Seven Springs I*, and it alleges nothing more than that TNC and the other defendants have taken certain "positions" to defend themselves in *Seven Springs I.* The Complaint does not allege that TNC (or any of the other defendants) have done anything, or that they have failed to do anything, they are somehow required to do.

Accordingly, the Complaint should be dismissed because it fails to state a cause of action known to New York law or, indeed, any body of law.

Background Facts

Seven Springs I

In May 2006, Plaintiff commenced *Seven Springs I*, seeking a declaration that it has an easement over a portion of so-called Oregon Road in North Castle, including an easement over lands owned entirely by TNC. (Exhibit 2)

Seven Springs I involves competing claims to the use of a road, commonly called Oregon Road. Seven Springs owns lands which lie, essentially, to the east of Oregon Road, and TNC owns lands - in a sort of "L"-shape - which lie to the west of Oregon Road, and, on the southerly side of Seven Springs's land, also on the east of Oregon Road. There is no dispute that, in *Seven*

Springs I, Seven Springs seeks a declaratory judgment, at least in part, that it has an easement over lands owned entirely by TNC.

TNC acquired its lands by deed dated May 1973, from the Eugene and Agnes B. Meyer Foundation ("Meyer Foundation"). TNC maintains its lands (the "TNC Parcel") as a nature preserve, as required by the Meyer Foundation. That portion of Oregon Road which abuts and lies within the TNC Parcel is, and has been, used as a hiking/nature trail since at least 1973.

Seven Springs acquired its lands by deed dated December 1995 from Rockefeller University. Seven Springs claims that the land it owns and which is involved in *Seven Springs I* (and in this case) is the same land as was conveyed by the Meyer Foundation to Yale University, and which ultimately was acquired by Seven Springs in 1995 (the "Seven Springs Parcel").

Even before Seven Springs had acquired the Seven Springs Parcel, however, in 1990, the Town of North Castle (the "Town") installed a gate which blocked and prevented vehicular access onto Oregon Road at its southerly terminus, where the unpaved portion of Oregon Road (which is the subject of this case) meets the northerly terminus of the paved portion of Oregon Road.

By order entered November 3, 2006, Justice LaCava granted the defendants' motion to dismiss the complaint in *Seven Springs I.* Seven Springs appealed that dismissal and, by order dated February 2008, the Appellate Division, Second Department, reversed and reinstated that complaint, stating only that Seven Springs had stated a cause of action "based upon an implied private easement arising in January 1973 when the [Meyer] Foundation conveyed to the plaintiff's predecessor in interest a parcel of land bounded by a road owned by the Foundation

and used at the time as a public highway." *Seven Springs, LLC v. Nature Conservancy*, 48 A.D.3d 545, 855 N.Y.S.2d 547 (2nd Dep't 2008).

Following the Second Department's decision, however, Seven Springs began to act as if it had won *Seven Springs I*, on the merits. Supreme Court subsequently disabused Seven Springs of that erroneous notion.

Shortly after *Seven Springs I* was returned to Supreme Court, TNC sought and obtained a preliminary injunction ("PI Order") (Exhibit 3) which enjoins Seven Springs from acting - and from making use of Oregon Road (including that portion owned by TNC) - as if the declaratory judgment it seeks in *Seven Springs I* had already been granted. The Court enjoined Seven Springs, and all persons having notice of that PI Order, from:

> (a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and
>
> (b) performing any work upon any land owned by TNC, including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal);

Seven Springs filed a notice of appeal, but it never perfected its appeal from that PI Order.

Seven Springs II

At about the same time as TNC filed the motion which resulted in the Preliminary Injunction Order ("PI Order"), Seven Springs commenced a second action, solely against the Town. *Seven Springs, LLC v. The Town of North Castle*, Index No. 5484/08 ("*Seven Springs II*").

The complaint in *Seven Springs II* (Exhibit 4) was substantially the same as the amended complaint in *Seven Springs I* - with one major difference: in *Seven Springs II*, Seven Springs sought $300 million in compensatory damages, and $300 million in punitive damages from the Town.

It is apparent that Seven Springs commenced *Seven Springs II* in order to pressure the Town to abandon its defense of *Seven Springs I* and to encourage the Town to pressure TNC to abandon its defense of *Seven Springs I* and to give Seven Springs what it wants: free use of Oregon Road for "secondary" vehicular access to a proposed (but not approved) development of multi-million-dollar luxury homes.

In the late winter/early spring of 2009, Seven Springs finally got what it wanted from the Town: the Town's acquiescence in Seven Springs's proposed development plan in exchange for discontinuance of *Seven Springs II* and discontinuance of the claims it had asserted against the Town in *Seven Springs I.* (Exhibit 5)

Seven Springs III

When TNC refused to settle with Seven Springs, Seven Springs commenced this action - *Seven Springs III.* The Complaint in this action is almost a carbon copy of the complaint Seven Springs filed against the Town in *Seven Springs II,* with one major difference: the Complaint now seeks damages of only $60 million - $30 million in compensatory damages (Cplt, ¶36), and $30 million in punitive damages (Cplt, ¶37) - down from the combined $600 million in damages Seven Springs had sought from the Town in *Seven Springs II.* (*Compare* Exhibits 1 and 4)

The Complaint in this action does not allege that TNC (or, indeed, any of the Defendants) did anything other than defend themselves in *Seven Springs I*; and it certainly does not allege that TNC or any other Defendant did anything more than "take[] the position" that Plaintiff does not have the rights to use Oregon Road which it seeks to have declared in its favor.

The Complaint does not allege - because it cannot allege - that Defendants have done anything other than to "take" a "position" and defend themselves in *Seven Springs I.* Rather, the Complaint alleges only that:

- "the Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road" (Cplt, ¶25); and
- "the Defendants continue to unlawfully and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder delay and /or preclude the development of the Seven Springs Parcel." (Cplt, ¶26)

The only "act" that can be implied from the Complaint - and it must be implied because it is not alleged in the Complaint - is that TNC and the other defendants herein have defended

themselves in *Seven Springs I*, and have refused to give Seven Springs what it wants before it has established its rights thereto in Court.

And, despite the fact that the Complaint fails to allege an actual "act" undertaken or committed by any of the Defendants in this case, Plaintiff nevertheless alleges that such "acts" are willful and malicious and justify an award of punitive damages.

Finally, this action is meritless if for no other reason than that the Court in *Seven Springs I* has not issued a declaratory judgment decreeing that Seven Springs has the rights it seeks in that action. The Complaint in this case has no basis in law, and this action has no purpose other than to punish Defendants for defending *Seven Springs I*, and for maintaining the TNC Parcel as a nature preserve as the grantor - the Meyer Foundation - required it to do.

Argument

THE COMPLAINT DOES NOT ASSERT A CAUSE OF ACTION KNOWN TO OR COGNIZABLE UNDER NEW YORK LAW

This Court must dismiss a complaint where, as here, it does not assert a cause of action known to or cognizable under New York law. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Even assuming the truth of all facts asserted in the Complaint, *id.; Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592 (1980); *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314 (1976), Plaintiff has not asserted - and it does not have - a cause of action known to or recognizable under New York law. *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, ___ A.D.3d ___, 884 N.Y.S.2d 94 (2nd Dep't 2009), *citing Steve*

Elliot, LLC v. Teplitsky, 59 A.D.3d 523, 524, 873 N.Y.S.2d 672 (2nd Dep't 2009); *Fishberger v. Voss*, 51 A.D.3d 627, 628, 858 N.Y.S.2d 257 (2nd Dep't 2008).

Where, as here, the facts as alleged do not fit within any cognizable legal theory, the cause of action must be dismissed. *Oszustowicz v. Admiral Ins. Brokerage Corp.*, 49 A.D.3d 515, 853 N.Y.S.2d 584 (2nd Dep't 2008).

The Complaint in this action alleges nothing more than that Plaintiff sued Defendants in *Seven Springs I*, claiming to have rights in and to Oregon Road and seeking a declaratory judgment as to the parties' rights, and that Defendants have defended themselves in that declaratory judgment action. The Complaint fails to state a cause of action known to or cognizable under New York Law.

1. There is no Contract-based Claim

There is - and can be - no allegation that TNC or any of the Defendants owed or breached any contractual duty to Plaintiff. Under New York law, a complaint for breach of contract must allege (1) the existence of a valid contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages. *Noise In Attic Productions, Inc. v. London Records*, 10 A.D.3d 303, 782 N.Y.S.2d 1 (1st Dep't 2004); *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2nd Dep't 1986); *accord J & L American Enterprises, Ltd. v. DSA Direct, LLC*, 10 Misc. 3d 1076(A), 814 N.Y.S.2d 890 (Sup. Ct., N.Y. Co. 2006); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2nd Cir. 1994). The Complaint alleges no contract and no contractual (or even *quasi*-contractual) duty owed to Plaintiff.

2. There is no Tort-based Claim

There is - and can be - no allegation that any of the Defendants owed or breached any other non-contractual duty to Plaintiff.

Tort duties arise out of a relation, they do not exist in a vacuum. Where, as here, the "acts" purportedly complained of in the Complaint revolve around the "position[s]" taken by TNC and the other Defendants in their defense of *Seven Springs I*, the relationship that must be examined is that of adverse parties in a litigation. There is nothing in New York law which requires that defendants in a lawsuit must refrain from taking positions in that lawsuit which, if sustained by the Court, would result in the dismissal or denial of that plaintiff's claim.

Because a finding of liability in tort must be based on a breach of duty, the threshold question in this case is whether the alleged tortfeasor (TNC and the Defendants) owed a duty of care to Plaintiff in the context of their defense of *Seven Springs I*. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); *Darby v. Compagnie National Air France*, 96 N.Y.2d 343, 728 N.Y.S.2d 731 (2001).

The answer is "no."

"The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court. *Sanchez v. State of New York*, 99 N.Y.2d 247, 252, 754 N.Y.S.2d 621 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585, 611 N.Y.S.2d 817 (1994); *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583, 657 N.Y.S.2d 357 (1997).

Although Plaintiff commenced *Seven Springs I*, it has not yet obtained the declaratory judgment which is the ultimate relief requested therein.[1] Moreover, when the Court granted TNC's motion for the PI Order, the Court expressly stated that: "I believe the defendants have show[n] a likelihood of success on the merits at this time." (Exhibit 6)

Accordingly, at this moment, Plaintiff simply does not have the rights to use Oregon Road which the Complaint alleges the Town of Bedford requires Plaintiff to have in order for Plaintiff even to be able to pursue its proposed development. (Cplt, ¶24)

3. Plaintiff has no Cause of Action based on any "Position" Taken by any Defendant in its Defense of *Seven Springs I*

A plaintiff, such as Seven Springs, has no independent cause of action against a defendant for defending itself in another ongoing action. A party has every right to defend itself in litigation.

Significantly, TNC's defense of *Seven Springs I* is more than justified: the Court in that case found that TNC - not Seven Springs - is likely to prevail and issued the PI Order.

The Complaint simply does not allege that TNC or the other Defendants in this action have done anything other than take a "position" in *Seven Springs I.*

In any event, actions taken and statements made in litigation are absolutely privileged, *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983); *Wiener v. Weintraub*, 22 N.Y.2d 330,

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[1] Thus, if Plaintiff were to try to craft a novel cause of action for, say, "malicious defense of action," along the lines of the cause of action for "malicious prosecution," Plaintiff would still have to show that the prior action, *Seven Springs I*, had been terminated in its favor. *See e.g. Felske v. Bernstein*, 173 A.D.2d 677, 570 N.Y.S.2d 331 (2nd Dep't 1991), *quoting Berman v. Silver, Forrester & Schisano*, 156 A.D.2d 624, 625, 549 N.Y.S.2d 125 (2nd Dep't 1989); *Oceanside Enterprises, Inc. v. Capobianco*, 146 A.D.2d 685, 537 N.Y.S.2d 190 (2nd Dep't 1989).

292 N.Y.S.2d 667 (1968); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.23d 136, 615 N.Y.S.2d 410 (2nd Dep't 1994); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 828 N.Y.S.2d 315 (1st Dep't 2007) ("the principle underlying the absolute privilege for judicial proceedings is that 'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'"); *Sinrod v. Stone*, 20 A.D.3d 560, 799 N.Y.S.2d 273 (2nd Dep't 2005), and they are not subject to collateral review in another plenary action.

Moreover, the Complaint itself demonstrates that it is not the "position" TNC has taken - or, indeed, anything else TNC has done or may have done - which is the proximate cause of any delay or interference with Plaintiff's purported development plan. The Complaint alleges that the Town of Bedford "has required, *among other things*, that Plaintiff have secondary access to the Seven Springs Parcel." *Id.* (emphasis added). The Complaint alleges that the Town of Bedford has required not just "secondary access" to the Seven Springs parcel but also "other things." *Id.*

Significantly, the Complaint does not even allege that such "secondary access" must be over Oregon Road and over TNC's land.

Without a judicial declaration that it has the rights over Oregon Road which it seeks in *Seven Springs I*, or which, the Complaint alleges, the Town of Bedford has required, "among other things," Plaintiff simply cannot contend that it has been damaged in any way whatsoever by any "position" TNC has taken in *Seven Springs I.*

4. The Complaint Contains no Basis for Claiming Punitive Damages

The Complaint contains a gratuitous, but unsupported, allegation that Defendants' unidentified "acts" are "unlawful, improper and intentional." (Cplt, ¶37) But the Compliant does not even allege that any of the Defendants actually did anything - malicious or otherwise.

Although Plaintiff alleges that TNC and the other defendants have acted maliciously or with malice, there is no factual allegation - well-pleaded or otherwise - that any of the Defendants has done anything that is or could remotely be considered as malicious. *See e.g. East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, ___ A.D.3d ___, 884 N.Y.S.2d 94 (2nd Dep't 2009).

Plaintiff's request for punitive damages in this case is meritless. "Punitive damages are only available for claims involving a gross and wanton fraud or wrong perpetrated upon the public at large." *Garrity v. Lyle*, 40 N.Y.2d 354, 357-58, 386 N.Y.S.2d 831 (1976); *see also Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994); *Aronis v. TLC Vision Centers, Inc.*, 49 A.D.3d 576, 853 N.Y.S.2d 621 (2nd Dep't 2008) ("[p]unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives").

The award of punitive damages must advance a strong public policy of the State by deterring its future violation. *Randi A.J. v. Long Island Surgi-Center*, 46 A.D.3d 74, 842 N.Y.S.2d 558 (2nd Dep't 2007). Indeed, as the Court of Appeals has often said, a principal goal of punitive or exemplary damages is to "deter future reprehensible conduct" by the wrongdoer

"and others similarly situated." *Id., quoting Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 479, 489, 836 N.Y.S.2d 509 (2007).

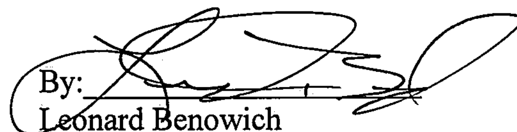
In this case, Plaintiff seeks recovery for a purely private wrong.

Conclusion

TNC's motion should be granted. The Complaint should be dismissed in all respects.

Dated: November 16, 2009

BENOWICH LAW, LLP



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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of defendants, ROBERT BURKE and TERI BURKE ("the BURKE defendants") in support of the within application for an Order pursuant to CPLR § 3211(a)(1) and (7) and 3211(g) to dismiss the plaintiff's Complaint.[1]

As will be set forth more fully herein, this action is nothing more than a baseless lawsuit attempting to intimidate and silence the BURKE defendants from defending themselves in a prior pending action relative to plaintiff's purported claim of an easement over a portion of Oregon Road in the Town of North Castle, abutting the BURKE defendants' property. Mastellone, Aff. **Exh. "B", "C"** and **"D"**. The complaint involved herein fails to properly state any legally cognizable claim against the BURKE defendants. The complaint fails to state with any requisite particularity any alleged wrongful conduct committed by the BURKE defendants, so as to give adequate notice of the claims and/or occurrences, which the plaintiff intends to prove. The complaint is virtually devoid of any information as to the dates of any alleged occurrences, or particulars as to what the BURKE defendants did, or failed to do, which would warrant the assertion of any legally cognizable claim against the BURKE defendants. Rather, it appears that the complaint is purposefully vague, in part, in order to avoid dismissal due to the expiration of the applicable statute of limitations and the complete absence of any articulable wrongful conduct by the BURKE defendants.

The complaint only alleges that the BURKE defendants, and likewise other defendants named in the action, have taken a "position" in a prior pending action that the

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[1] Cited exhibits are attached to the Affirmation in Support of the Motion to Dismiss and will be referenced herein as Mastellone, Aff. **Exh. "-"**.

plaintiff does not have easement rights over Oregon Road, which the plaintiff claims to have. Notably, there has been no judicial determination that the plaintiff has any such claimed right. Further, any statements made or actions taken by the BURKE defendants in the pending litigation are absolutely privileged. Moreover, plaintiff's complaint constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP Suit).

Noticeably absent from the complaint are any allegations as to what the BURKE defendants did or failed to do, which would entitle the plaintiff to $60,000,000 in compensatory and/or punitive damages. Likewise, the complaint is devoid of any allegations which rise to the level of misconduct required to sustain a claim for punitive damages.

Accordingly, the complaint should be dismissed as against the BURKE defendants with prejudice.

STATEMENT OF FACTS

On or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of the Real Property Action and Proceedings Law to compel a determination of claims relative to real property, described and known as Oregon Road, located in the County of Westchester. Mastellone, Aff. **Exh. "B"** (hereinafter referred to as "the 2006 action"). Thereafter, the plaintiff filed an Amended Complaint in the 2006 action. Mastellone, Aff. **Exh. "C"**. In the 2006 action, plaintiff claims a right of ingress and egress on said Oregon Road ("the subject premises"). Mastellone Aff. **Exh. "C"**. The 2006 action alleges that the BURKE defendants own property which abuts Oregon Road. Mastellone,

Aff. **Exh. "C"**. The BURKE defendants have appeared in the 2006 action and are defending the claims raised therein. Mastellone Aff. **Exh. "D"**.

There has been no judicial determination regarding whether the plaintiff possesses an easement to the subject property. The 2006 action is currently pending and there is currently a Preliminary Injunction in place. Mastellone, Aff. **Exhibit "E"**. The Preliminary Injunction, dated April 14, 2008, prohibits the plaintiff from entering the subject premises with any vehicles or equipment and from performing any work on the premises for the plaintiff's alleged and intended development. Mastellone Aff. Exh. "E".

On or about March 14, 2008, the plaintiff commenced an action in the Supreme Court Westchester County entitled, *Seven Springs v. The Town of North Castle*, bearing Index No.: 05484/08, which sought compensatory and punitive damages against the Town of the North Castle. Mastellone, Aff. **Exh. "F"**.

The Town of North Castle subsequently settled the above referenced action pursuant to the terms reflected in the Stipulation of Settlement. Mastellone, Aff. **Exh. "G"**. Notably, there was no money damages paid to the plaintiff. Rather, under the threat of damages claimed against them, the Town of North Castle abandoned its defense of the claims asserted in the prior pending 2006 action, and the plaintiff discontinued its claim for damages against the Town of North Castle. Mastellone, Aff. **Exh. "G"**. Clearly, the action for money damages against the Town of North did what it was intended to do – intimidate the Town of North Castle to abandon the defense of the claims in the 2006 action.

On or about September 22, 2009, the plaintiff commenced the within action against the same defendants named in the 2006 action (except the Town of North Castle),

and namely; against the BURKE defendants. The complaint in the instant matter is vaguely worded, lacks specificity as to particular acts of wrongdoing allegedly committed by the BURKE defendants and seeks both compensatory and punitive damages. Mastellone, Aff. **Exh. "A"**. The complaint in the within action is noticeably similar to the complaint against the Town of North Castle. Mastellone Aff., **Exh. "A"** and **"F"**. The complaint in this action alleges nothing more than that the defendants, without specification as to the wrongful conduct committed by each specific defendant, have categorically taken the "position" in the 2006 action that the plaintiff is not entitled to a right of access to the subject property. Mastellone, Aff. **Exh. "A"**.

The complaint does not, nor can it, allege that the BURKE defendants have done anything except defend themselves in the 2006 action. This baseless lawsuit is nothing more than an attempt by the plaintiff to intimidate the BURKE defendants and silence them in the defense of the claims asserted in the 2006 action. The plaintiff's complaint is an impermissible SLAPP suit.

As will be set forth more fully herein, the Complaint is deficient and should be dismissed in its entirety.

ARGUMENT

POINT I

THE COMPLAINT FAILS TO STATE WITH PARTICULARITY ANY LEGALLY COGNIZABLE CLAIM AGAINST THE BURKE DEFENDANTS

The legal standard applicable to a motion to dismiss is well established. The Court's "task is to determine whether, 'accepting as true the factual averments of the complaint, the plaintiff can succeed upon any reasonable view of the facts state.'"

Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565, quoting, People v. New York City Tr. Auth., 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502(1983). While the Court must determine the narrow question of whether the complaint states a cognizable cause of action, the allegations in the complaint cannot be vague and conclusory. Stoianoff v. Gahoma, 670 N.Y.S.2d 204, 248 A.D.2d 525 (2d Dep't 1998). Moreover, the CPLR requires that the "[s]tatements in a pleading must give the court and parties adequate notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR § 3013. Where the facts as alleged do not fit within any cognizable legal theory, the court must dismiss the complaint. Oszustowicz v. Admiral Insurance Brokerage Corp., 49 A.D.3d 515, 853 N.Y.S.2d 584 (2d Dep't 2008), *citing*, Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Application of these legal standards to the instant complaint yields the unmistakable conclusion that the complaint is deficient. As an initial matter it must be noted that while the caption of the complaint appears to be against multiple defendants, the body of the complaint lacks particularity as to the alleged wrongful conduct of each named defendant. Significantly, none of the purported allegations specifically identify any wrongful conduct allegedly committed by the BURKE defendants. Indeed, neither ROBERT BURKE and/or TERI BURKE are named as committing any act in the plaintiff's complaint. Rather, the plaintiff's complaint categorically alleges that the defendants have taken, and continue to take, the "position" that plaintiff has no right to access the subject parcel. Mastellone, Aff. **Exh. "A"**, ¶ 25. The complaint alleges nothing more than that the BURKE defendants have defended themselves in a prior

pending action; a right to which the BURKE defendants are undeniably entitled. Mastellone, Aff. **Exh. "A"** and **"B"**.

Further, the complaint is also devoid of any particular time period within which the defendants are alleged to have taken a "position" so as to give notice to the defendants as to the time of the occurrence, as is statutorily required. CPLR § 3013. Plaintiff has failed to adequately allege any particular time period for the BURKE defendants alleged wrongful conduct.

The complaint is further deficient as it fails to state any legally cognizable claim against the BURKE defendants.

A. <u>The Complaint Fails to Allege Any Claim in Contract</u>

The vaguely worded Complaint does not allege that the BURKE defendants were in privity of contract with the plaintiff or that the BURKE defendants breached any contractual agreement with the plaintiff. To establish a cause of action for breach of contract, the complaint must allege (a) the formation of a contract between the plaintiff and the BURKE defendants; (b) performance by the plaintiff; (c) the BURKE defendants failure to perform; and (d) resulting damage. See, <u>Furia v. Furia</u>, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dep't 1986). Moreover, the complaint must allege the provisions of the contractual agreement upon which the claim is allegedly based. <u>Sud v. Sud</u>, 211 A.D.2d 423, 621 N.Y.S. 37 (1st Dep't 1995).

Here, there are no allegations in the complaint of the existence of any contractual agreement between the plaintiff and the BURKE defendants. The complaint fails to allege any breach of any specific term or provision of a contractual agreement. Moreover, no such contract exists and thus, the plaintiff's complaint must be dismissed.

B. <u>The Complaint Fails to Allege Any Claim Sounding in Tort</u>

The vaguely worded Complaint does not allege any claim sounding in tort. The complaint does not and cannot allege that the BURKE defendants owned any non-contractual duty to the plaintiff which was purportedly breached. The complaint is simply devoid of any wrongdoing by the BURKE defendants.

A finding of liability must be premised upon the breach of a duty. "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant [owed] a duty to the plaintiff." Pulka v. Edelman, 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976) *quoting*, Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339, 342 (1928). "In the absence of duty, there is no breach and without a breach there is no liability. Id., *quoting*, Kimbar v. Estis, 1 N.Y.2d 399 at 405, 153 N.Y.S.2d 197 (1956). The existence and scope of a duty is a question of law for the court to decide. Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 746 N.Y.2d. 170 (2002).

Applying these principles here, the complaint is completely deficient. The complaint fails to allege that the BURKE defendants owed any duty whatsoever to the plaintiff. Likewise, the complaint fails to allege that the BURKE defendants breached any purported duty to the plaintiff. The complaint is devoid of any allegation of wrongdoing by the BURKE defendants. The complaint simply alleges that the defendants have categorically taken the "position" in a prior pending action that the plaintiff does not have easement rights to the property. Said allegation falls far short of the pleading requirements and utterly fails to establish any duty or breach of duty owed to the plaintiff by the BURKE defendants. Indeed, this baseless action is nothing more than

an attempt to intimidate and silence the BURKE defendants from defending themselves in the 2006 action.

Any purported claim sounding in tort may also be barred by the applicable statute of limitations. As indicated the complaint lacks any specific reference to any particular time period so as to give notice to the defendants as to the time of the occurrence as statutorily required. CPLR § 3013. At one point in the complaint, reference is made to the date of June 12, 2006, or the date that the plaintiff acquired the subject property. To the extent that the vaguely worded complaint alleges a claim sounding in negligence, it is barred by the applicable statute of limitations of three (3) years.[2] See, CPLR § 214. To the extent that the vaguely worded complaint alleges a claim sounding in intentional tort, it is barred by the applicable statute of limitations of one (1) year. See, CPLR § 215. Based upon the lack of specificity; however, the BURKE defendants cannot be said to have reasonable notice of the transactions or occurrences by which the plaintiff alleges to have been wrong so as to assert proper and viable defenses against the plaintiff's claims.

C. The BURKE Defendants are Undeniably Entitled to Defend Themselves in the Prior Suit

The complaint in this matter fails to allege any wrongdoing by the BURKE defendants. Rather, the complaint alleges that the BURKE defendants have simply defended themselves in a prior action seeking declaratory relief. Mastellone, Aff. **Exh. "A"**. No cause of action exists against the BURKE defendants for simply defending themselves in another pending action. Moreover, any actions or statements made by the BURKE defendants during the course of the pending litigation, relative to any "position" taken, as alleged by the plaintiff, are privileged.

[2] Plaintiff's complaint in the instant matter was not filed until September 22, 2009.

The actions and statements made by the defendants during the course of litigation in the 2006 action are absolutely privileged. Park Knoll Associates v. Schmidt, 59 N.Y.2d 205, 464 N.Y.S.2d 424 (1983). See also, Weiner v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); Allan and Allan Arts, Ltd., v. Rosenblum, 201 A.D.2d 136, 615 N.Y.S.2d 410 (2d Dep't 1994). It has been held that statements made during the course of litigation are afforded absolute privilege because "'the interest of society requires that whenever [persons] seek the aid of courts of justice, either to assert or to defend rights of person, property, [or] liberty, speech and writing therein must be untrammered and free . . . the law gives to all who take part in judicial proceedings . . . a right to speak and to write.'" Id at 139; *quoting*, Park Knoll Associates v. Schmidt, 89 A.D.2d at 170, rev'd on other grounds 59 N.Y.2d 205 (1983). Statements made by litigants are absolutely privileged such that those may speak freely, "insulated from harassment and fear of financial hazard." Park Knoll Associates v. Schmidt, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983).

Here, the plaintiff's complaint alleges no specific acts or omissions by the BURKE defendants. Rather, the complaint is vaguely worded with no reference to particular occurrences or dates of occurrences. The complaint simply alleges that the defendants have taken a "position" in the 2006 action that the plaintiff has no right to access the subject premises. Even if true, such statements made by the BURKE defendants are absolutely privileged. No independent cause of action exists for the BURKE defendants defending themselves in the 2006 action.

Moreover, there has been no declaration that the plaintiff has any rights to the subject property such that any claim of interference with the plaintiff's intended development of the property even exists. Thus, any "position" taken by the defendants in the 2006 cannot be said to be interfering with any right judicially determined in favor of the plaintiff. Indeed, there is currently an injunction in place precluding the plaintiff from performing any work upon the subject premises. Mastellone, Aff. **Exh. "E"**. Again, the complaint is devoid of any specific actions or omissions by the BURKE defendants which allegedly caused the plaintiff any harm.

Accordingly, the plaintiff's complaint should be dismissed.

POINT II

PLAINTIFF'S COMPLAINT CONSTITUTES AN IMPERMISSIBLE SLAPP SUIT

Plaintiff's complaint constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP suit), based upon the provisions of Civil Rights Law § 76-a, subject to dismissal pursuant to CPLR §§ 3211(g) and 3211(a)(7). See, CPLR § 3211(g). Indeed, this baseless action was commenced for the sole purpose of silencing the BURKE defendants, relative to the defense of claims asserted in the 2006 action. Plaintiff's $60 million claim for damages is intended to intimidate the BURKE defendants to succumb to the plaintiff's claimed right of easement as alleged in the 2006 action. While the BURKE defendants have asserted that any statements or actions taken relative to the defense of the 2006 action are absolutely privileged, it is further asserted that any "position", as vaguely worded by the plaintiff in the complaint, is a communication or action, protected under the provisions of Civil Rights Law § 76-a. Accordingly, the plaintiff's complaint should be dismissed.

In 1992 the New York State Legislature enacted Civil Rights Law §§ 70-a and 76-a "to provide heightened protections for defendants in actions which involve 'public participation' often referred to as [Strategic Lawsuit Against Public Participation] SLAPP suits." Hariri v. Amper, 51 A.D.3d 146, 854 N.Y.S.2d (1st Dep't 2008). Civil Rights Law § 76-a relative to actions involving public petition and participation states as follows:

> 1. For purposes of this section:
>
> (a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.
>
> (b) "Public applicant or permittee" shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.
>
> (c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.
>
> (d) "Government body" shall mean any municipality, the state, any other political subdivision or agency of such, the federal government, any public benefit corporation, or any public authority, board, or commission. See, Civ. R. § 76-a.

The Court of Appeals has commented about SLAPP suits stating the following:

> "In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities required approval of public boards. Termed SLAPP suits, strategic lawsuits against public participation, such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with defense costs and the threat of liability and to discourage those who might with to speak out in the future." 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 137, 589 N.Y.S.2d 825 (1992).

Here, plaintiff's complaint alleges that the defendants have continued to take the "position" that the plaintiff is not entitled to an easement or use of the subject premises for plaintiff's intended development. While vaguely worded, to the extent that the plaintiff's complaint is alleging that the defendants have contested or will contest plaintiff's alleged entitlement to an easement and/or development of the subject property, plaintiff's complaint constitutes an impermissible SLAPP suit. This vaguely worded lawsuit, devoid of any specific allegations of wrongdoing by the BURKE defendants and gratuitously alleging $60 million in compensatory and punitive damages, cannot be said to be anything more than an attempt to intimidate the BURKE defendants and silence them in the defense of the claims (or their "position") asserted in the 2006 action. The BURKE defendants should not be required to defend themselves in the 2006 action under the threat of liability in a baseless, legally deficient lawsuit. This would be contrary to the intended purpose of New York's Anti-SLAPP legislation.

CPLR § 3211(g) provides for a mechanism by which a defendant(s), may seek dismissal of a complaint, which is commenced for such a purpose. More specifically, where a moving party demonstrates that an action is a SLAPP suit, the complaint must be dismissed, unless the responding party can demonstrate that the cause of action has a substantial basis in law. See, CPLR § 3211(g). See also, Matter of Related Properties, Inc., v. Town Board of Town/Village of Harrison, 22 A.D.3d 587, 802 N.Y.S.2s 221 (2d Dep't 2005). Here, the plaintiff's complaint falls far short of alleging any wrongdoing by the BURKE defendants. The BURKE defendants have sufficiently demonstrated that the plaintiff has failed to assert any legally cognizable claim against them.

Accordingly, the plaintiff's complaint should be dismissed in its entirety.

POINT III

PLAINTIFF'S CLAIM SEEKING PUNITIVE DAMAGES SHOULD BE DISMISSED AS PLAINTIFF IS NOT ENTITLED TO SUCH AN AWARD IN THIS MATTER

Plaintiff's claim seeking punitive damages should be dismissed as the plaintiff is not entitled to such an award in this matter. As asserted *infra*, the plaintiff's complaint contains unsupported, vague and unidentified actions, which are allegedly "unlawful, improper and intentional" without specification as to the acts or conduct allegedly committed by the defendants. The complaint does not allege any conduct which would warrant a claim for punitive damages.

The leading New York case concerning punitive damages is Walker v. Sheldon, 10 N.Y.2d 401, 223 N.Y.S2d 488 (1961). In Walker, the New York Court of Appeals recognized that historically "[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives. . ." 10 N.Y.2d at 404, 223 N.Y.S.2d at 490. Citing a prior observation, the Court further noted that "[I]t is not the form of the action that gives the right to the jury to give punitory damages, but the moral culpability of the defendant." 10 N.Y.2d at 404-5, 223 N.Y.S.2d at 491 (*citing*, Hamilton v. Third Ave. R.R. Co., 53 N.Y. 25, 30).

Applying these principles, the Court held that punitive damages were warranted in a fraud or deceit action where "the fraud is aimed at the public generally, is gross and involves high moral culpability" and where "the defendant's conduct evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a

criminal indifference to civil obligations." 10 N.Y.2d at 405, 223 N.Y.S.2d at 491. Thus, the Court of Appeals set a very high standard for the award of punitive damages. More recent decisions by the Court of Appeals have added that the standard is to be strictly applied. See, Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339, 343 (1994).

In Rocanova v. Equitable Life Assur. Soc. of U.S., 83 N.Y.2d 603, 612, N.Y.S.2d 339 (1994), the Court considered whether the plaintiffs were entitled to punitive damages in claims of fraud and breach of duty with regard to insurance coverage. Dismissing all claims for punitive damages, the Court held that "[p]unitive damages are not recoverable for an ordinary breach of contract, as their purpose is not to remedy private wrongs but to vindicate public rights." 83 N.Y.2d at 613, 612 N.Y.S.2d at 342. The Court further noted, applying principles set forth in Walker that only where a breach of contract involves "a fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations,'" are punitive damages recoverable, and then only "if the conduct was 'aimed at the public generally.'" Id. In Rocanova, the Court emphasized, "a party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally." Id.

In the present case, the plaintiff has made no allegations concerning wrongs committed against the public generally. Plaintiff's Complaint makes broad allegations against all defendants without any allegations as to how the public was effected. Further, the plaintiff's allegations certainly do not allege conduct, which rises to the nearly

criminal level necessary to justify an award of punitive damages. Therefore, this Court should dismiss the plaintiff's claim, which demands punitive damages.

CONCLUSION

The plaintiff's Complaint as against the BURKE defendants should be dismissed in its entirety with prejudice.

Dated: White Plains, New York
December 2, 2009

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: [signature]
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

That on the 2nd day of December, 2009, deponent served the within document(s) entitled Memorandum Of Law In Support Of The Burke Defendants' Motion To Dismiss The Complaint upon:

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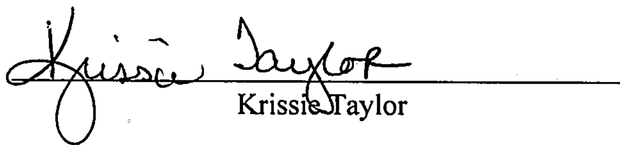
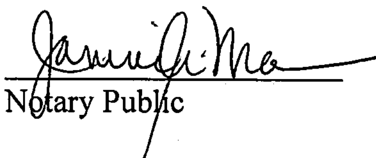
at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.



Krissie Taylor

Sworn to before me this
2nd day of December 2009



Notary Public

JANINE A. MASTELLONE
NOTARY PUBLIC, State of New York
No. 02MA6160820
Qualified in Putnam County
Commission Expires Feb. 12, 2011

2603091.1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X

SEVEN SPRINGS, LLC

Plaintiff, Index No.: 21162/09

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.
---X

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

MEMORANDUM OF LAW IN SUPPORT OF NOEL B. DONOHOE AND JOANN DONOHOE'S MOTION TO DISMISS THE COMPLAINT

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X
SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 21162/09

- against –

THE NATURE CONSERVANCY,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.
---X

MEMORANDUM OF LAW
IN SUPPORT OF NOEL B. DONOHOE AND JOANN
DONOHOE'S MOTION TO DISMISS THE COMPLAINT

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of defendants Noel B. Donohoe and Joann Donohoe (the "Donohoes") in support of their motion to dismiss the complaint filed by Plaintiff Seven Springs, LLC ("Seven Springs") on or about September 22, 2009 (the "Complaint") upon the ground that it fails to state a cause of action. Since the instant action constitutes "an action involving public petition and participation", as defined in Civil Rights Law §76-a, the Complaint *must* be dismissed pursuant to CPLR §3211(g) unless Seven Springs can demonstrate that its cause of action "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law". As will be demonstrated herein, in the accompanying affirmation of Lois N. Rosen dated December 11, 2009 (the "Rosen Affirmation"), and in the papers submitted by co-defendants The Nature Conservancy ("TNC") and Robert Burke and Teri Burke (the "Burkes") in support of their respective motions to

dismiss[1], Seven Springs cannot make this requisite showing. Accordingly, the Complaint should be dismissed in its entirety.

STATEMENT OF FACTS

The instant lawsuit is the third in a series brought by Seven Springs with respect to its purported easement right over a long ago abandoned stretch of roadway known as Oregon Road in the Town of North Castle (the "Town"). In 2006, Seven Springs brought a declaratory judgment action (referred to herein as "*Seven Springs I*") against TNC, the Town, Realis Associates, the Burkes and the Donohoes claiming that it had rights over this portion of roadway. By order dated November 3, 2006, this Court (La Cava, J.) dismissed the complaint. (*See* Rosen Affirmation, Exhibit B.) Seven Springs thereafter appealed, and Justice La Cava's order was reversed by order of the Appellate Division, Second Department dated February 13, 2008. (*See* Rosen Affirmation, Exhibit C.) After the complaint was reinstated, TNC successfully obtained a broadly worded preliminary injunction which prohibited Seven Springs from entering upon this portion of Oregon Road for almost any purpose except to walk or hike thereon (or to perform land surveys). (*See* Order Granting Preliminary Injunction filed and entered on April 14, 2008, p. 3, a copy of which is annexed to the affirmation of Leonard Benowich dated November 16, 2009 ["Benowich Aff."] as Exhibit 3.) At the April 4, 2008 oral argument on the injunction motion, Justice Bellantoni repeatedly stated that the defendants had shown a likelihood of success on the merits. (*See* Benowich Aff. Exhibit 6) This injunction, which continues in full force and effect, effectively precludes Seven Springs from using this portion of Oregon Road as an access route. Therefore, Seven Springs cannot correctly maintain that Defendants have blocked its access to

---

[1] The Donohoes adopt and incorporate by reference in their entirety the arguments raised by TNC in its Memorandum of Law in Support of The Nature Conservancy's Motion to Dismiss Complaint dated November 16. 2009 and by the Burkes in their Memorandum of Law in Support of the Burke Defendants' Motion to Dismiss the Complaint dated December 2, 2009 ("Burke Mem").

this portion of roadway when in truth its access has been – and continues to be – blocked by court order.

Having had no success in *Seven Springs I,* Seven Springs commenced a second action (referred to herein as "*Seven Springs II"*) solely against the Town. This action, which sought a combined $600 million in compensatory and punitive damages, was subsequently settled by the parties thereto. Seven Springs agreed to discontinue its two actions against the Town if the Town, *inter alia,* would cooperate with Seven Springs and "support the use of Oregon Road as a gated private road providing sole access to Plaintiff's North Castle property." The Town's change in stance presumably resulted from the fact that its litigation with Seven Springs had been "lengthy, protracted and costly". (*See* Stipulation of Settlement dated February 25, 2009, a copy of which is annexed to the Benowich Aff. as Exhibit 5.)

Having been successful in bullying the Town into submission, Seven Springs decided to employ the same strategy and bring a new action against TNC, the Burkes and the Donohoes. The Complaint in this action, referred to herein as "*Seven Springs III*", states one cause of action as against these parties that is virtually identical, in substance, to the cause of action that Seven Springs asserted against the Town. The only difference between the two lawsuits is that Seven Springs is only seeking $60 million in combined compensatory and punitive damages from the Defendants herein (instead of the $600 million that it sought from the Town in *Seven Springs II*).

A review of the Complaint herein makes it clear that it totally lacks foundation. It contains absolutely no specificity as to any wrongdoing allegedly committed by the Donohoes, and alleges in conclusory fashion that the Defendants have taken the "position" that Seven Springs has no right to access its property over Lower Oregon Road. If Seven Springs is alleging that the Donohoes have taken this position as part of their defense of *Seven Springs I*, such

conduct is absolutely privileged and not the proper subject of subsequent litigation. Alternatively, if Seven Springs is alleging that the Donohoes took this position outside the scope of *Seven Springs I*, such conduct is likewise not the proper subject of subsequent litigation. Seven Spring's Complaint, without more, clearly is intended to harass the Donohoes and force them to defend against this vexatious litigation. Therefore, the instant action constitutes an impermissible SLAPP suit and should be dismissed for this reason as well.

ARGUMENT

POINT I

THE COMPLAINT MUST BE DISMISSED AS AGAINST THE DONOHOES BECAUSE IT FAILS TO STATE ANY CAUSE OF ACTION

In *Campaign for Fiscal Equity, Inc. v State of New York,* 86 NY2d 307 (1995), the Court of Appeals succinctly stated the standard for review when considering the sufficiency of a complaint subject to a motion to dismiss under CPLR §3211(a)(7) for failure to state a cause of action:

> [O]ur well-settled task is to determine whether, "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated" ...We are required to accord plaintiffs the benefit of all favorable inferences which may be drawn from their pleading, without expressing our opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact. *Id. at* 318. (citations omitted)

While the court must accept the allegations of a complaint to be true and determine only whether the facts alleged fit into any cognizable legal theory, *"bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference". Ruffino v New York City Transit Authority,* 55 AD3d 817, 818 (2d Dep't 2008)(emphasis in original).

The sufficiency of a pleading will generally depend upon whether or not there was substantial compliance with CPLR §3013, which requires a pleading to be "sufficiently

particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense". *Foley v D'Agostino,* 21 AD2d 60 (1st Dep't 1964)("The 'basic requirement * * * [now] is that the pleadings identify the transaction and indicate the theory of recovery with sufficient precision to enable the court to control the case and the opponent to prepare.'")(citation omitted)

The Complaint herein falls woefully short of meeting the CPLR §3013 pleading requirement for two reasons. First, it gives no notice of any particular transaction or occurrence which forms the basis of Seven Springs' claim. To the contrary, the Complaint states only, in the most conclusory and general terms imaginable, that the "Defendants have taken ... the position that Plaintiff has no right to access the Seven Springs Parcel ... ." This allegation, without more, does not provide sufficient notice of the transactions or occurrences of which Seven Springs now complains. Second, as discussed below, the Complaint does not contain the material elements of any legally cognizable cause of action.

The Complaint does not contain the material elements of a claim sounding in breach of contract. In order to state a cause of action for breach of contract, a plaintiff must allege: (1) the formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damages. *Furia v Furia,* 116 AD2d 694 (2d Dep't 1986). The complaint must specify the provisions of the contract upon which the claim is based. *Sud v Sud,* 211 AD2d 423 (1st Dep't 1995); *Shields v School of Law, Hofstra University,* 77 AD2d 867 (2d Dep't 1980). *See, e.g., Steinblatt v. Imagine Media, Inc.*, 304 AD2d 648 (2d Dep't 2003)(motion to dismiss complaint granted because plaintiffs failed to state legally

cognizable claims alleging breach of contract). As applied herein, the Complaint herein fails to allege any of the elements necessary to support a breach of contract claim.

The Complaint does not contain the material elements of a claim sounding in tort. A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. *Espinal v Melville Snow Contractors, Inc.,* 98 NY2d 136, 138 (2002); *Darby v Compagnie National Air France,* 96 NY2d 343 (2001). "Absent a duty of care, there can be no breach and no liability." *Gordon v Muchnick,* 180 AD2d 715 (2d Dep't 1992) The existence and scope of that duty is a question of law for the courts to determine. *Espinal v Melville Snow Contractors, Inc., supra* at 138. Since the Complaint herein contains no allegation that the Donohoes owed any duty of care to Seven Springs, no tort cause of action is stated.[2]

In fact, it appears that the Complaint fails to state any legally cognizable claim under New York law. Where the facts as pled do not fall within any cognizable legal theory, the cause of action must be dismissed for failure to state a cause of action. *Oszustowicz v Admiral Insurance Brokerage Corp.,* 49 AD3d 515, 516 (2d Dep't 2008); *see, e.g., Star Contracting Co., Inc. v McDonald's Corporation,* 201 AD2d 721 (2d Dep't 1994)(plaintiff's cause of action for conversion of intangible property properly dismissed because no cause of action lies for said conduct); *Dean R. Pelton Company, Inc. v Moundsville Shopping Plaza, Inc.,* 173 AD2d 201 (1st Dep't 1991)(brokerage firm could not prevail on cause of action for conspiracy to deprive broker of its commission because such conspiracy is not recognized as an independent tort); *Johnson v Yeshiva University,* 53 AD2d 523 (1st Dep't 1976), *aff'd* 42 NY2d 818 (1977)(six causes of action set forth in plaintiff's complaint were "not known to the law" and would be dismissed;

[2] In addition, any cause of action sounding in tort would be barred by the applicable statute of limitations. (*See* Burke Mem. p. 8.)

those causes of action "should await legislative sanction and should not be accepted by judicial fiat")(citation omitted).

Seven Springs has alleged only that the Defendants herein have taken "the position that Plaintiff has no right to access the Seven Springs Parcel", and that Defendants "continue to unlawfully and wrongfully deprive Plaintiff of its right to access the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel". (Rosen Affirmation, Exhibit A, ¶¶25, 26) These allegations, without more, do not constitute any valid cause of action known under New York law. Therefore, the Complaint should be dismissed under CPLR §3211(a)(7).

POINT II

ASSUMING *ARGUENDO* THAT THE COMPLAINT STATES A VALID CAUSE OF ACTION, IT NEVERTHELESS SHOULD BE DISMISSED

Even if the Court were to determine that Seven Springs' novel argument constituted some sort of legally cognizable cause of action, the Complaint should still be dismissed. Any "position" taken by the Donohoes in defending *Seven Springs I* is absolutely privileged. In addition, the Complaint clearly constitutes an impermissible Strategic Lawsuit Against Public Participation ("SLAPP") lawsuit proscribed by Civil Rights Law §76-a and should be dismissed for this reason as well.

A. Any actions taken or statements made by the Donohoes in defending Seven Springs I are absolutely privileged.

While the Complaint lacks specificity as to the forum in which Defendants purportedly "have taken ... the position that Plaintiff has no right to access the Seven Springs Parcel", presumably Seven Springs is claiming that the Defendants wrongfully took this position in *Seven Springs I.* If this is, in fact, what Seven Springs is claiming, any position taken by the Donohoes

or any of the Defendants during the course of litigating *Seven Springs I* is absolutely privileged. *Park Knoll Associates v Schmidt,* 59 NY2d 205, 208 (1983); *Sinrod v Stone,* 20 AD3d 560, 561 (2d Dep't 2005)("Statements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding")(citations omitted). The rationale for the according of an absolute privilege in these circumstances was well-expressed by the Second Department in the context of a libel action in *Allan and Allan Arts Ltd v Rosenblum,* 201 AD2d 136, 139 (2d Dep't 1994):

> "'The interest of society requires that whenever [persons] seek the aid of courts of justice, either to assert or to defend rights of person, property, [or] liberty, speech and writing therein must be untrammelled and free. The good of all must prevail over the incidental harm to the individual. So the law offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because if [persons] were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth. The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a *right* to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation'". (citations omitted)(emphasis in original)

In accordance with the foregoing, any "position" taken by the Donohoes is absolutely privileged and not subject to suit.

B. <u>The Complaint constitutes an impermissible SLAPP suit</u>.

The New York SLAPP statutes, Civil Rights Law §§70-a and 76-a, were enacted by the Legislature in 1992 to provide heightened protection for defendants when lawsuits are brought against them to stifle their rights to public petition and participation. Shortly after these statutes were enacted, the Court of Appeals, in *600 West 115th Street Corp. v Von Gutfeld*, 80 NY2d 130 (1992), *cert. denied* 508 US 910 (1993), commented:

> In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public

> meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits-strategic lawsuits against public participation-such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future. *Id.* at 137, n.1.

"The primary objective of SLAPP suits is not to win. Instead of achieving victory in court, SLAPP suits are designed to intimidate the petitioners into dropping their initial petitions due to the expense and fear of extended litigation ... (T)he primary motivation behind filing SLAPP suits is to retaliate against successful opposition and prevent future opposition." *Hariri v Amper,* 51 AD3d 146 (1st Dep't 2008).

Applying these tenets to the case at bar, it is clear that the instant action constitutes a classic SLAPP suit. Seven Springs is not looking to prevail on the merits herein; to the contrary, it is hoping to intimidate the Donohoes and the other Defendants, and to raise the spectre of untold legal expense and endless litigation going forward. This improper use of the judicial system should not be condoned by the Court. Therefore, in accordance with CPLR §3211(g), the Complaint must be dismissed since Seven Springs cannot meet the heightened standard of proof necessary to sustain its baseless cause of action.

POINT III

ASSUMING *ARGUENDO* THAT THE COMPLAINT STATES A VALID CAUSE OF ACTION, THE PUNITIVE DAMAGES CLAIM NEVERTHELESS SHOULD BE DISMISSED

Punitive damages are recoverable "in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future." *Walker v Sheldon,* 10 NY2d 401, 404 (1961). Punitive damages are generally not recoverable for an ordinary breach of contract unless "the breach also involves a

fraud evincing a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations'". *Rocanova v Equitable Life Assurance Society of the United States,* 83 NY2d 603, 613 (1994)(citing *Walker*). The *Rocanova* Court went on to state:

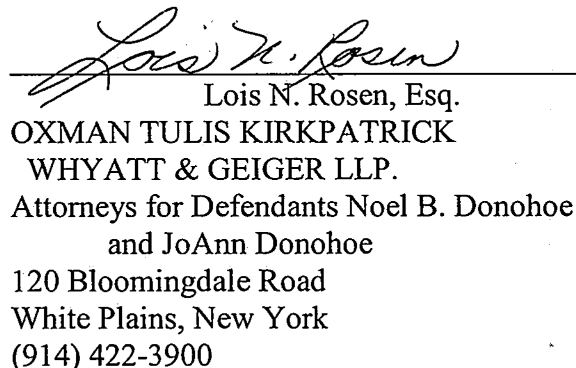
> A private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally. Clearly, then, the standard for awarding punitive damages is "a strict one" ... and this extraordinary remedy will be available "only in a limited number of instances". *Id.* (citations omitted)

The allegations set forth in the Complaint do not even begin to approach the "strict" standards enunciated by the Court of Appeals in *Rocanova.* The Complaint contains no allegations that the Donohoes or any of the Defendants engaged in immoral or wantonly dishonest conduct. Further, nowhere is there any allegation that Defendants' conduct was "part of a pattern of similar conduct directed at the public generally". In accordance with the foregoing, Seven Springs' claim for punitive damages must fall.

CONCLUSION

For the reasons set forth above, the Donohoes respectfully request that their motion to dismiss the Complaint be granted in its entirety.

Dated: White Plains, New York
December 11, 2009



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SEVEN SPRINGS, LLC

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendants.

---X

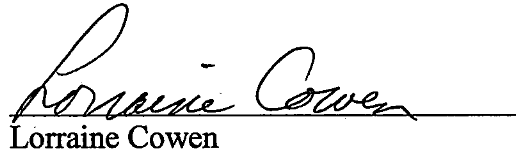
AFFIDAVIT OF SERVICE

Index No.: 21162/09

STATE OF NEW YORK)

COUNTY OF WESTCHESTER) ss:

LORRAINE COWEN, being duly sworn, deposes and says: I am not a party to the action: I am over the age of 18 years old; I reside in Scarsdale, New York and on December 11, 2009, I served a copy of the within Memorandum of Law upon the parties listed below by mailing same by regular mail in a sealed envelope, with postage paid thereon, in a official depository of the U.S. Postal Service within the State of New York.



Lorraine Cowen

Sworn to before me this
11th day of December, 2009

NOTARY PUBLIC

LOIS N. ROSEN
NOTARY PUBLIC, State of New York
No. 4720985
Qualified in Westchester County
Commission Expires August 31, 20 10

TO: DelBello, Donnellan, Weingarten,
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ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SEVEN SPRINGS, LLC,

Index No. 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOAN DONOHOE,

Defendants.

---X

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

RECEIVED
JAN 29 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss and in Support of Plaintiff's Cross-Motion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X
SEVEN SPRINGS, LLC,

Plaintiff,

-against-

Index No. 21162/09

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOAN DONOHOE,

Defendants.
---X

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Seven Springs, LLC ("Plaintiff" or "Seven Springs") in opposition to the motion of Defendant The Nature Conservancy (the "Nature Conservancy"), the motion of Defendants ROBERT BURKE and TERI BURKE and the motion of Defendants NOEL B. DONOHOE and JOANN DONOHOE, which seek an Order pursuant to CPLR 3211 (a) (1) and (7) and CPLR 3211(g) dismissing the instant action, and in support of Plaintiff's cross-motion for an Order pursuant to CPLR Sections 305 and 3025(b) amending Plaintiff's Complaint, and granting Plaintiff leave to serve and file an Amended Complaint in the form annexed to Plaintiff's cross-motion papers.

This action seeks monetary damages against the Defendants based upon their actions in denying and/or precluding the Plaintiff from exercising its rights to an Easement that provides

access to its property over the road commonly known as Oregon Road in the Town of North Castle, New York.

For the reasons set forth herein, as well as in the Affidavit of Donald J. Trump sworn to January 21, 2010 (the "Trump Aff."), the Affidavit of Alfred E. Donnellan, Esq. (the "Donnellan Aff.") sworn to January 21, 2010, and the documentary evidence attached thereto it is respectfully submitted that the Plaintiff's cross-motion should be granted, and the Defendants' motions should be denied because the complaint, as amended, sets forth a valid, well plead cause of action that is not time barred.

STATEMENT OF FACTS

The factual allegations in opposition to Defendants' motions and in support of Plaintiff's cross-motion are set forth in the Trump Aff. and Donnellan Aff., and are incorporated herein by reference[1].

POINT I

THE COMPLAINT SETS FORTH VALID CAUSES OF ACTION AND DEFENDANTS' MOTIONS TO DISMISS SHOULD BE DENIED

> "On a motion to dismiss an action pursuant to CPLR 3211(a)(7), the court must accept the factual allegations of the complaint as true, accord the plaintiff all favorable inferences which may be drawn therefrom, and determine only whether the facts as alleged fit within any cognizable legal theory...Furthermore, "[u]nder CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss". (Citations omitted).

Gem Serv. of New York, Inc. v. United Gen. Title Ins. Co., 28 A.D.3d 516, 814 N.Y.S.2d 653, 654 (2d Dept. 2006).

The sole criterion in considering a motion to dismiss is:

> "... whether the pleading states a cause of action, and if from its four corners

1 Defined terms used here have the same meaning as set forth in the Donnellan Aff., unless indicated otherwise.

factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (see Foley v. D'Agostino, 21 A.D.2d 60, 64-65, 248 N.Y.S.2d 121, 125-127; Siegel, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR 3211:24; p. 31; 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3211.36). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate".

Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182, 185 (1977).

In order for a defense of failure to state a cause of action to be successful the defendant must convince the Court that "nothing the plaintiff can reasonably be expected to prove would help; that the plaintiff just doesn't have a claim". SIEGEL, NY PRACTICE (4th Edition), Sec. 265. The criterion used in determining such a motion are that the pleadings will be deemed to allege whatsoever may be implied from its statements by reasonable intendment and the pleader is entitled to every favorable inference that might be drawn. SIEGEL, N.Y. PRACTICE, supra.

As more particularly set forth below, the Amended Complaint states a valid cause of action sounding in tort.

A. Plaintiff's Application to Serve an Amended Complaint Should be Granted

CPLR 3025 provides, in relevant part, as follows:

> (b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

CPLR 305(c) provides as follows:

> "Amendment. At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced."

The language of the statute codifies the power of the Court to exercise the widest discretion in granting leave to serve amended pleadings to ensure full litigation of the controversy. See 5 *Weinstein Korn & Miller,* 3025.11, pp. 30-589-592. As a general rule, "permission to amend pleadings should be 'freely given' [CPLR 3025, subd (b)] . . ." Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957.

The instant application for leave should be granted. CPLR 3025(b) provides that: "leave to amend a pleading may be given at any time and that such leave shall be freely given upon such terms as may be just". *See* In re Salon Ignazia, Inc., 34 A.D.3d 821, 826 N.Y.S.2d 129 (2d Dept. 2006) (defendant entitled to serve amended answer with counterclaim); *see also* Karras v. County of Westchester, 71 A.D.2d 878, 879, 419 N.Y.S.2d 653, 655 (2nd Dept. 1979). The amendment will insure that all relevant issues between the parties are fully litigated and placed before the Court for determination.

Leave to amend a pleading should be given even after lengthy delay in litigation: Stengel v. Clarence Materials Corp., 144 A.D.2d 917, 918, 534 N.Y.S.2d 28, 29 (4th Dept. 1988), Seaman Corp. v. Binghamton Savings Bank, 243 A.D.2d 1027, 1028, 663 N.Y.S.2d 432, 433 (3rd Dept. 1997). In the within action, there has been no lengthy delay in the litigation, nor will the within application cause same. This action was commenced less than 4 months ago. Since this matter is in the early stage, none of the parties would be prejudiced by the relief requested.

B. The Amended Complaint sets forth a valid cause of action sounding in tort

"The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful (see Freihofer v. Hearst Corp.,

65 NY2d 135, 142-143, 490 NYS2d 735, 480 NE2d 349; Curiano v. Suozzi, 63 NY2d 113, 117, 480 NYS2d 466, 469 NE2d 1324). To make out a claim sounding in prima facie tort, 'the plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]' (R.I. Is. House, LLC v. North Town Phase II Houses, Inc., 51 AD3d 890, 896, 858 NYS2d 372)." Epifani v. Johnson, 65 AD3d 224, 882 NYS2d 234 (2d Dept. 2009).

The proposed Amended Complaint alleges, among other things, as follows:

- Plaintiff has sought to develop the Seven Springs Parcel, and in connection with the development submitted various plans and proposals to the Planning Board of The Town of North Castle and to the Planning Board of the Town of Bedford.

- In order to develop the Seven Springs Parcel pursuant to certain plans and proposals the Town of Bedford Planning Board has required, among other things, that Plaintiff have secondary access to the Seven Springs Parcel. The only viable secondary access to the Seven Springs Parcel is from the south. The only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road.

- The Town of Bedford Planning Board's refusal to permit development of the entire Seven Springs Parcel would not have occurred but for the Defendants' actions.

- The Defendants have taken, and continue to take, the position that Plaintiff has no right to access the Seven Springs Parcel from the south over Oregon Road, and have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its rights over Oregon Road.

- Plaintiff would have been able to develop the Seven Springs Parcel but for the Defendants' actions.

- The Defendants continue to unlawfully, intentionally and wrongfully deprive Plaintiff of its right to access the Easement and the Seven Springs Parcel, and to hinder, delay and/or preclude development of the Seven Springs Parcel by a system of conduct on their part, which intends to harm Plaintiff.

- As a result of the Defendants' actions, Plaintiff, Plaintiff's visitors, tradespeople, vehicles and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to the north to access the Seven Springs Parcel.

- The Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence was and is the sole motivation for Defendants' actions.

- That the injuries complained of are consistent and continuous and Plaintiff has suffered and will suffer injury, which injury will be continuous, and that to obtain any redress the Plaintiff will necessarily be involved in continued litigation with the Defendants and will suffer continuing damages.

- By reason of the foregoing Plaintiff has sustained actual and special damages in an amount to be determined at trial but not less than $60,000,000.00, as follows:

(a) Plaintiff's inability to use the Easement - $5,000,000.00

(b) Diminution in value of the Seven Springs Parcel - $50,000,000.00

(c) Plaintiff's inability to access the Seven Springs Parcel over Oregon Road - $5,000,000.00

(See Amended Complaint, par. 24-34 and 42.) (A copy of the proposed Amended Complaint is annexed to the Donnellan Aff. as Exhibit "A".)

An easement is an incorporeal right which is appurtenant to the ownership of the dominant estate and which constitutes a charge upon the servient estate. It is a right of property, a non-possessory interest in land. (See 49 NY Jur.2d Easements §2.)

Defendants have sought, and taken steps which have had the effect of temporarily precluding Plaintiff from using the Easement (i.e. preliminary injunctive relief). This affirmative action, taken by Defendants, in depriving Plaintiff the use and enjoyment of the Oregon Road easement, is clearly an infringement on Plaintiff's property rights and right to use said Easement, and as such, constitutes a tort.

Defendants' interference with (i) Plaintiff's property rights, (ii) Plaintiff's full use and enjoyment of the property, (iii)Plaintiff's right to ingress and egress over the Easement to access the Seven Springs Parcel, (iv) development of the Seven Springs' Parcel and (v) with Plaintiff's encumbered right to access this Seven Springs Parcel unquestionably has caused, and continues to cause, economic injury to Plaintiff. Each day that passes results in a loss of potential earnings and profits for Plaintiff, which Plaintiff has a right to recover in the event that its rights to the Easement over Oregon Road are determined in its favor.

The criteria for reviewing the within motion requires that the Court take all of the Plaintiff's allegations as set forth in its Complaint (as amended) and Affidavits as true and resolve all inferences which reasonably flow therefrom in favor of Plaintiff.

Based upon the foregoing, it is respectfully submitted that Plaintiff has stated a valid cause of action against the Defendants and Plaintiff's cross-motion to amend the Complaint herein should be granted.

POINT II

This action is not an action involving public petition and participation as defined by CPLR §76-a(1)(a), and CPLR 3211(g) does not apply to Defendants' motions.

Defendants Burke and Donohoe claim that this case is an action involving public petition and participation as defined in Civil Rights Law §76-a(1)(a), commonly referred to as a "SLAPP suit", an acronym for its generic label, "Strategic Lawsuit Against Public Participation", and the standard set forth in CPLR §3211(g) should be applied to the portions of the motion seeking dismissal under CPLR §3211(a)(7).

This claim is without merit. That is because this action does not fall within the parameters of the statute. See Hariri v. Amper, 51 AD3d 146, 854 NYS2d 126 (1st Dept., 2008) and Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead, 98 F. Supp. 2d 347 (2000).

Civil Rights Law §76-a(1)(a) states:

> (a) An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

SLAPP suits are brought to "stop citizens from exercising their political rights or to punish them for having done so." See Yeshiva v. Chofetz, supra. However, the SLAPP statute is in derogation of the common law and must be strictly construed. Hariri v. Amper, supra. Not surprisingly, Defendants cite no case law where the SLAPP Law was applied to a suit involving a dispute between private parties with respect to competing claims to real property, as is the case herein.

This action is brought by Plaintiffs to recover damages against the Defendants arising out of Defendants' actions in denying and/or precluding the Plaintiff from exercising its rights to an Easement that provides access to its property over the road commonly known as Oregon Road in

the Town of North Castle, New York. In addition, there is no currently pending application to develop the portion of the Seven Springs Parcel located in North Castle. (See Trump Aff.) Accordingly, Plaintiff is not a "public applicant or permitee" within the meaning of Civil Rights Law §76-a. See Hariri, supra (landowner wishing to use property as airport was not a "public applicant or permitee" under SLAPP statute where he had never made formal application for zoning variance allowing for that use).

Finally, it is asserted in the Defendants' motion papers that Seven Springs is not looking to prevail on the merits. (Donohoe Memorandum of Law, page 9.) This assertion is simply incorrect. The 2006 Action involves Plaintiff's right to an easement over Oregon Road. Plaintiff's primary motive has been, and continues to be, to establish its right to the Easement Area, as set forth in the 2006 Action. This action simply seeks to assert Plaintiff's right to monetary damages as a result of the Defendants' actions.

Since this action is based upon private parties' rights to real property, it is not an action involving public petition and participation as defined by CPLR §76-a(1)(a), and CPLR 3211(g) does not apply to the Defendant's motions.

Notwithstanding the foregoing, even assuming for the purposes of this motion that CPLR §3211(g) did apply, and it is submitted otherwise, as set forth above, the Amended Complaint has a substantial basis in law.

Based upon the foregoing, Defendants' motions should be denied.

POINT III

PLAINTIFF'S ACTION IS TIMELY

A cause of action for prima facie tort is governed by a three-year Statute of Limitations where the injury alleged is essentially to the plaintiffs' economic interests, rather than to their

reputation. See, Jemison v. Crichlow, 139 AD2d 332, 531 NYS2d 919 (2d Dept. 1988). Furthermore, "the continuing wrong doctrine provides that, in certain cases involving continuous or repeated wrongs, the statute of limitations accrues upon the date of the last wrongful act. ('[I]n certain tort cases involving continuous or repeated injuries, the statute of limitations accrues upon the date of the last injury...' ('[A] claim to redress a continuing wrong will be deemed to have accrued on the date of the last wrongful act.'). (Citations omitted.) See, Margrabe v. Sexton & Warmflash, PC, 2009 WL 261830 (SDNY 2009). See, also Dabb v. Nynex Corp., 262 AD2d 1079, 691 NYS2d 840 (4th Dept., 1999) (applying continuing wrong doctrine to trespass and nuisance claims); Bloomingdales, Inc. v. New York City Transit Authority, 13 NY3d 61, 915 NE2d 608 (2009); and Cranesville Block Co., Inc. v. Niagara Mohawk Price Corp., 175 AD2d 444, 572 NYS2d 495 (3d Dept., 1991) (continuous interference with right to use of an easement gives rise to successive causes of action).

This case seeks monetary damages as a result of Defendants' continuing actions in precluding Plaintiff's use of the Easement Area, which have resulted in economic injury to Plaintiff. The Defendants continued action in depriving Plaintiff of its right to the Easement Area gives rise to continuous causes of action against the Defendants. Moreover, even if Defendants' actions do not constitute a continuing tort, and it is submitted otherwise, the Defendants action in seeking injunctive relief in February, 2008, and temporarily enjoining Plaintiff from exercising its rights to the Easement, triggered the accrual of Plaintiff's claims in this action[2]. This action was brought within the three year statute of limitations and, accordingly, is timely.

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[2] While a temporary injunction is currently in place with respect to the use of Oregon Road, the granting of the injunction does not constitute the law of the case or an adjudication on the merits. See Kaplan v. Queens Optometric Assoc., 293 AD2d 449, 739 NYS2d 461 (2d Dept., 2002).

Finally, CPLR §203(f) provides that for limitations purposes a claim in an amended pleading will be deemed to relate back to the time the claim in the original pleading was interposed as long as the original one gives notice of the transaction or occurrence out of which the claim in the amended pleading arises. As set forth above, Plaintiff's claim in this action is consistent with the claims asserted by Plaintiff in the Complaint and Amended Complaint in the 2006 Action. In both actions the Complaint alleges that "No personal claim is made against any Defendant herein named unless such Defendant shall assert a claim adverse to the claim as set forth herein". (See Complaint, par. 33 and Amended Complaint, par. 34.) The 2006 Action clearly gives notice of the transactions and occurrences out of which the claims in this action arise. Accordingly, this action is timely.

POINT IV

Plaintiff is entitled to Punitive Damages

Punitive damages are recoverable for a wide variety of intentional torts when the plaintiff can show that the defendant committed the tort and can demonstrate the existence of circumstances of aggravation or outrage, such as spite, or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton. See generally, Carvel Corp. v. Noonan, 350 F.3d 6, 24 (2nd Cir. 2003); Prozeralik v. Capital Cities Communications, Inc., 82 NY2d 466, 479, 605 NYS2d 218 (1993).

In Prozeralik v. Capital Cities Communications, 82 NY2d 466, 479 (1993), the Court wrote that punitive damages may be sought when the wrongdoing was deliberate "and has the character of outrage frequently associated with crime" (citation omitted). The misconduct must be exceptional, "as when the wrongdoer has acted maliciously, wantonly, or with a recklessness

that betokens an improper motive or vindictiveness...or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights" [citations and internal quotation marks omitted]. Sharapata v. Town of Islip, 56 NY2d 332, 437 NE2d 1104 (1982).

As is true in any action concerning a common law tort, punitive damages are available when the wrongful act is motivated by malice or wanton or reckless disregard of the plaintiff's rights or is accompanied by other aggravating circumstances. See Le Mistrial, Inc. v. Columbia Broadcasting System, 61 AD2d 491, 402 NYS2d 815 (1st Dept. 1978); MacKennan v. Bern Realty Co., 30 Ad2d 679, 291 NYS2d 953 (2nd Dept 1968).

It has been specifically held that punitive damages may be awarded where, as here, there is an obstruction of an easement, and the Court determines that the obstruction occurred in a malicious fashion. See, Anniskiewicz v. Harrison, 291 AD2d 829, 737 NYS2d 3116 (4th Dept., 2002). See, also Chlystun v. Kent, 185 AD2d 525, 586 NYS2d 410 (3d Dept.) (punitive damages may be awarded in a trespass action as a penalty to the trespasser and as a warning to others where the alleged conduct shows malice, a flagrant interference with the plaintiff's right to possession or other aggravating circumstances).

As set forth above, the Amended Complaint alleges that the actions taken by Defendants are willful, malicious, and are intended to deprive Plaintiff of its property rights and access to its property. As hereinbefore discussed, when considering a motion to dismiss pursuant to CPLR 3211(a)(7), the criterion used in determining such a motion are that the pleadings will be deemed to allege whatever may be implied from its statements, the pleader is entitled to all favorable inferences which may be drawn therefrom, and the Court is to determine only whether the facts as alleged fit within any cognizable legal theory. Gem Serv. of New York, Inc, supra.

Defendants intentional conduct in preventing and obstructing the Plaintiff's use of the Easement is a flagrant interference with Plaintiff's rights. Based on the foregoing, Plaintiff has stated a valid claim for punitive damages against the Defendants.

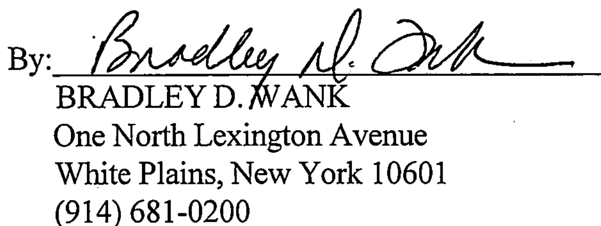
CONCLUSION

For the reasons set forth herein, it is respectfully submitted that Defendant's motions should be denied in their entirety, and Plaintiff's cross-motion should be granted in its entirety.

Dated: White Plains, New York
January 22, 2010

Yours, etc

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff



By: ______________________
BRADLEY D. WANK
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

On the Brief:
Alfred E. Donnellan, Esq.
Bradley D. Wank, Esq.

1296253_10
0143500-001

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss:
COUNTY OF WESTCHESTER)

CHRISTINE WILLIAMS, being sworn says:

I am not a party to the action, am over 18 years of age and reside at White Plains, New York (office).

On January 22, 2010, I served a true copy of the annexed **Memorandum of Law in Opposition to Defendants' Motions to Dismiss and in Support of Plaintiff's Cross-Motion** in the following manner:

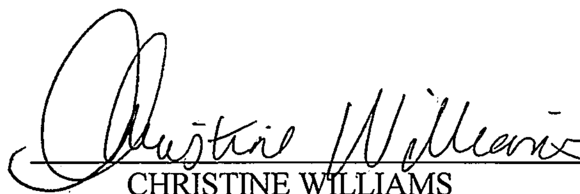
by depositing the same with an overnight delivery service in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

TO:

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
120 Bloomingdale Road
White Plains, New York 10605
Federal Express Tracking No.:
7931 9924 7259

Benowich Law, LLP
1025 Westchester Avenue
White Plains, New York 10604
Federal Express Tracking No.:
7931 9926 2237

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
3 Gannett Drive
White Plains, NY 10604
Federal Express Tracking No.:
7983 2030 8773



CHRISTINE WILLIAMS

Sworn to before me this
22nd day of January, 2010.

NOTARY PUBLIC

DONNA M. GEDEON
Notary Public, State of New York
No. 01GE4796577
Qualified in Rockland County
Commission Expires Feb. 28, 2010

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
---x

SEVEN SPRINGS, LLC, Plaintiff, -against- THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE, Defendants.	Index No. 21162/09 **REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR LEAVE TO AMEND**

---x

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

RECEIVED
FEB 22 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

LEONARD BENOWICH, an attorney admitted to practice in the Courts of this State, affirms the following under penalty of perjury:

1. I am a member of Benowich Law, LLP, counsel of record for defendant The Nature Conservancy ("TNC").

2. Unless otherwise indicated, I have personal knowledge of the facts and circumstances set forth herein and submit this affidavit in order to place copies of the following documents before the Court:

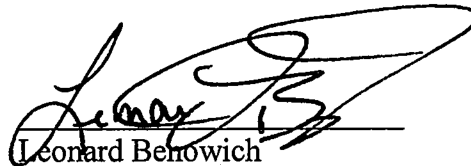
(a) A true copy of the Agreement between TNC and the Eugene and Agnes E. Meyer Foundation ("Foundation") dated May 25, 1973 is annexed as **Exhibit 7**;

(b) A true copy of page v-94 of Plaintiff's February 1998 Draft Environmental Impact Statement is annexed as **Exhibit 8**;

(c) A true copy of counsel's letter dated August 10, 2007 is annexed as **Exhibit 9**.

3. For the foregoing reasons, and for the reasons set forth in the accompanying memorandum of law, I respectfully submit that the Complaint should be dismissed, and Plaintiff's motion for leave to amend should be denied.

Dated: February 19, 2010



Leonard Benowich

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\LB-ReplyAff.wpd

7

Exhibit 7

AGREEMENT by THE NATURE CONSERVANCY, a District of Columbia corporation, having an office at 1800 North Kent Street, Arlington, Virgnia (TNC), in respect of the Meyer Sanctuary (hereinafter defined).

In consideration of the transfer by the Eugene and Agnes E. Meyer Foundation, having its office at 1730 Rhode Island Avenue, N. W., Washington, D. C. (the Foundation), to TNC of two parcels of real property (collectively called the Meyer Sanctuary), one parcel consisting of approximately 122.4 acres, and the other of approximately 108.6 acres, located in the Towns of North Castle and New Castle, Westchester County, State of New York, and more particularly described in a deed from the Foundation to TNC (the Deed), dated the same date as this Agreement and intended to be recorded promptly in Westchester County Clerk's Office, TNC hereby agrees as follows:

1. TNC will promptly apply to the appropriate governmental authorities for the exemption of the Meyer Sanctuary from real property taxes (the Taxes). In the event that TNC is unable to obtain such exemption for all or any part of the Meyer Sanctuary, TNC shall be entitled to promptly reconvey the fee simple title to all or any part of the Meyer Sanctuary not so exempted to the Foundation, or to such other grantee as

the Foundation shall direct in writing, by recordable bargain and sale deed with covenant against grantor's acts and free from all liens or encumbrances (the Reconveyance). In the event that exemption is obtained, but is later denied, canceled or lost for all or any part of the Meyer Sanctuary, TNC shall be entitled to promptly execute and deliver a Reconveyance of all or any part of the Meyer Sanctuary, with respect to which such exemption is denied, canceled or lost, to the Foundation, or to such other grantee as the Foundation shall direct in writing, and in the event of such reconveyance TNC shall repay to the Foundation or such other grantee such proportionate share of the $200,000 endowment to be received by TNC for the maintenance of the Meyer Sanctuary (the Endowment), as shall then be agreed upon by TNC and the Foundation.

2. In the event that TNC shall at any time fail to continue to maintain all or any part of the Meyer Sanctuary as a nature preserve or in a way which will conserve its essential natural character, TNC will promptly execute and deliver a Reconveyance of all or such part of the Meyer Sanctuary to the Foundation, or to such other grantee as the Foundation shall direct in writing, and TNC shall repay to the Foundation or such other grantee the then balance of the Endowment, or, if TNC shall continue to maintain any part of the Meyer Sanctuary, such proportionate share of the Endowment as shall then be agreed upon by TNC and the Foundation.

3. This agreement shall bind TNC, its successors and assigns, benefit the Foundation, its successors and assigns, and be deemed to run with the land of the Meyer Sanctuary.

Dated:

THE NATURE CONSERVANCY,

By [signature]

ACCEPTED:

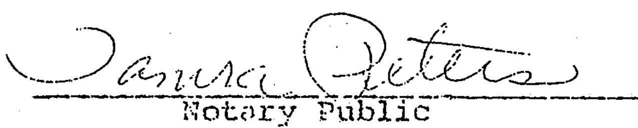
EUGENE AND AGNES E. MEYER FOUNDATION,

By [signature]

Chairman

STATE OF VIRGINIA)
) ss.:
COUNTY OF ARLINGTON)

On this 25th day of May 1973, before me personally came Everett M. Woodman , to me, who, being by me duly sworn, did depose and say that he resides at Virginia ; that he is President of THE NATURE CONSERVANCY, one of the corporations described in and which executed the foregoing instrument; and that he signed his name thereto by order of the Board of Governors of said corporation.



Notary Public

my commission expires; 12/16/74

District of Columbia } ss.:

On this day of May 1973, before me personally came DAVIDSON SOMMERS, to me, who, being by me duly sworn, did depose and say that he resides at 3500 WATSON PL. N.W. Wash. D.C.; that he is CHAIRMAN of EUGENE AND AGNES E. MEYER FOUNDATION, one of the corporations described in and which executed the foregoing instrument; and that he signed his name thereto by order of the Board of Directors of said corporation.

[signature]
Notary Public

My Commission Expires March 14, 1975

8

Exhibit 8

ANNEXED TO THE FOREGOING:
EXHIBIT A-FEBRUARY 1998 DRAFT ENVIRONMENTAL IMPACT STATEMENT
[329-330]

SEVEN SPRINGS

DRAFT ENVIRONMENTAL IMPACT STATEMENT

Volume 2

February 1998

RECEIVED
MAR 5 1998
TOWN OF NORTH CASTLE, N.Y.
ANNEMARIE KELLY, Town Clerk

Poor Quality

2. **Access from Oregon Road in North Castle**

By eliminating the man-made barricade and improving the existing dirt roadway, it would be possible to extend the existing Oregon Road (south) in North Castle to the north into the Seven Springs site. However, this road connection, in the absence of condemnation, would require approval from The Nature Conservancy, which fully owns the entire road bed south of Seven Springs, and from the Town of North Castle, which officially closed the road in 1990. At the present time, the owners of the Seven Springs site have no rights to utilize any part of this portion of the roadway.

Such a road connection had been suggested as part of the original planning for the Seven Springs project. Hence, it was included in the DEIS scoping document as an alternative. The approximately 1,500 feet of off-site road bed has an average width of 12 feet. It borders steep slopes and wetlands. If it were utilized for site access, widening and grading would be necessary. Retaining walls would be required as part of any proposed construction to minimize excavation and disturbance of steep slopes. The same characteristics would apply regardless of whether the potential road were designed for permanent or emergency access.

3. **No Access to Sarles Street**

The Seven Springs development could occur with one means of access, rather than two, eliminating the proposed access to Sarles Street. This alternative, shown in Exhibit 5-46 and 5-47, would result in less impact to wetlands, wetland buffers and steep slope areas to the immediate east of Sarles Street. It would also avoid disturbance of the rock wall, regrading, and tree removal required to develop adequate sight distance under the proposed action. The traffic impacts of an alternative with no access to Sarles Street would result in some additional volumes on Oregon Road (north) and at the intersection of Byram Lake Road and Oregon Road.

However, levels of service and recommended improvements would be the same as under the proposed action and the residential alternatives with access to both Sarles Street and Oregon Road (north).

The arrival and departure distributions for the residential development with no access to Sarles Street are shown on Exhibits 5-48 and 5-49. The resulting site generated traffic volumes, illustrated on Exhibits 5-50 to 5-55, were added to the Year 2000 NO-Build Traffic Volumes resulting in the Year 2000 Build Traffic Volumes shown on Exhibit 5-56 to 5-61.

9

Exhibit 9

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP

COUNSELLORS AT LAW

THE GATEWAY BUILDING
ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

(914) 681-0200
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JANET J. GIRIS*
FRANK J. HAUPEL
PAUL L. MARX†
FAITH G. MILLER
PATRICK M. REILLY
JAMES J. SULLIVAN
BRADLEY D. WANK*
MARK P. WEINGARTEN*
LEE S. WIEDERKEHR
PETER J. WISE, AICP†

JACOB E. AMIR
MATTHEW S. CLIFFORD
JENNIFER M. JACKMAN*
JENNIFER A. LUPARDO*
SUSAN CURRIE MOREHOUSE
PERRY M. OCHACHER
STEPHAN A. RAPAGLIA
JESSICA H. RESSLER
MICHAEL J. SCHWARZ*
DANIEL G. WALSH
EVAN WIEDERKEHR
HEIDI WINSLOW

ANDREW J. BALINT
RICHARD A. KATZIVE
BRANDON R. SALL*
ELIOT M. SCHUMAN
DAVID R. SELENICK & CO., LLP

COUNSEL

*MEMBER OF NY & CT BARS
†MEMBER OF NY & NJ BARS
*MEMBER OF NY & DC BARS
*MEMBER OF NY, NJ & MA BARS
*MEMBER OF NY, NJ, CT & FL BARS

August 10, 2007

By Facsimile and Mail

Chairman Peg Michelman
Members of the Planning Board
Town of North Castle
15 Bedford Road
Armonk, New York 10504

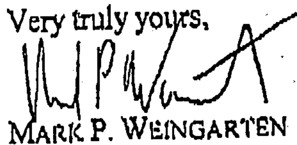
Re: **Seven Springs**

Dear Chairman Michelman and Members of the Planning Board:

We represent Seven Springs, LLC, the applicant for approval of a subdivision of the property commonly known as Seven Springs. Our client has asked us to advise the Planning Board that it hereby withdraws the application made to the Planning Board for approval of a subdivision of the portion of the property that is within the Town of North Castle.

Thank you for your consideration.

Very truly yours,



MARK P. WEINGARTEN

cc: Supervisor Reese Berman
Roland A. Baroni, Jr., Esq., Town Attorney
Adam Kaufman, AICP, Planning Director
Chairman Donald J. Coe, Bedford Planning Board
Joel Sachs, Esq., Bedford Town Attorney
Jeffrey Osterman, AICP, Bedford Planning Director
Donald J. Trump
Hal Goldman
Peter J. Wise, Esq.

9

RECEIVED
AUG 10 2007
TOWN OF NORTH CASTLE
PLANNING BOARD

Certificate of Service (by U.S. Mail)

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on February 19, 2009, I served a true copy of the foregoing **Reply Affirmation In Further Support of Motion To Dismiss And In Opposition To Motion For Leave To Amend** and **TNC's Memorandum Of Law In Support Of Its Motion To Dismiss Complaint And In Opposition To Plaintiff's Motion For Leave To Amend Its Complaint** upon the following counsel:

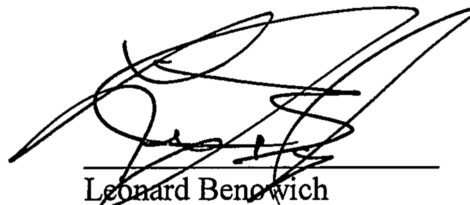
Bradley Wank (bdw@ddw-law.com)
DelBello Donnellan Weingarten, Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

Lois Rosen (lrosen@oxmanlaw.com)
OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for Defendants Noel B. and Joann Donohoe

Janine Mastellone (janine.mastellone@wilsonelser.com)
WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
3 Gannett Drive
White Plains, New York 10604-3407
Attorneys for Defendants Robert and Teri Burke

by e-mail; and by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: February 19, 2009



Leonard Benowich

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

---x

SEVEN SPRINGS, LLC, Index No. 21162/09

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

---x

REPLY AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO MOTION FOR LEAVE TO AMEND

Benowich

BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

To

Service of a copy of the within is hereby admitted.

Dated:.. ....

Attorney(s) for ....

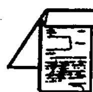
staple here

2903 © 1983 JULIUS BLUMBERG, INC.

staple here

1. Place cover this side up on top of first page of document. Staple as indicated.

2. Lift bottom of cover up and over top, folding on top score line


3. Fold cover down behind papers on remaining score line.

STATE OF COUNTY OF ss.:

I, the undersigned, an attorney admitted to practice law,

Check Applicable Box

☐ Certification By Attorney — certify that the within has been compared by me with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — state that I am the attorney(s) of record for in the within action; I have read the foregoing and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

....
The name signed must be printed beneath

STATE OF COUNTY OF ss.:

I, being duly sworn, depose and say: I am

Check Applicable Box

☐ Individual Verification — the in the within action: I have read the foregoing and know the contents thereof: the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

☐ Corporate Verification — the of a corporation and a party in the within action; I have read the foregoing and know the contents thereof: and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

....
The name signed must be printed beneath

STATE OF COUNTY OF ss.: (If both boxes are checked—indicate after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years of age and reside at

On I served the within

Check Applicable Box

☐ Service By Mail — by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within this State, addressed to each of the following persons at the last known address set forth after each name:

☐ Personal Service on Individual — by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person served to be the person mentioned and described in said papers as *a party therein:*

Sworn to before me on

....
The name signed must be printed beneath

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

---x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants,

---x

Index No. 21162/09

Assigned Justice
(William Giacomo)

RECEIVED
FEB 22 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

TNC'S REPLY MEMORANDUM OF LAW IN SUPPORT
OF ITS MOTION TO DISMISS COMPLAINT
AND IN OPPOSITION TO PLAINTIFF'S
<u>MOTION FOR LEAVE TO AMEND ITS COMPLAINT</u>

Benowich
BENOWICH LAW, LLP
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

The mission of The Nature Conservancy is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the land and waters they need to survive.[1]

Preliminary Statement

Defendant The Nature Conservancy ("TNC") respectfully submits this reply memorandum in further support of its motion to dismiss the Complaint and in opposition to Plaintiff's motion for leave to amend its Complaint.

Plaintiff's motion for leave to amend its Complaint should be denied as futile.

Plaintiff's amended complaint - like its filed Complaint - alleges nothing more than that the Defendants in this case, including TNC, have had the temerity to defend themselves in *Seven Springs I*,[2] and to protect their rights and interests in their own property. Seven Springs has not prosecuted *Seven Springs I*, and it certainly has not moved for or obtained the declaration it seeks as the ultimate relief in that action. At this date, no court has declared that Seven Springs does, in fact, have the rights it claims. To the contrary, this Court has already stated that TNC - not Plaintiff - has a likelihood of succeeding. (*See* TNC Exs. 3, 6) Accordingly, no defendant can be said to have interfered with Seven Springs's purported rights, when no Court has declared that Seven Springs even has such rights.

Plaintiff acknowledges that while it may have "stated" a claim, there has been no judicial determination on the merits that it "has" or even can prevail on a claim to use the so-called

---

[1] http://www.nature.org/aboutus

[2] Capitalized terms have the same meaning as used in TNC's papers in support of its motion to dismiss the Complaint.

Easement Area. (Donellan Aff., ¶21) No Court has actually stated that Plaintiff does, in fact, have the rights it claims to have, and no Court has yet stated that the positions defendants have taken to defend themselves in *Seven Springs I* - the only "act" that any of the defendants is alleged to have done - is wrong, improper or unjustified.

Until a Court actually determines that Plaintiff has the rights it claims - including the rights it claims but has not established in and to the so-called Easement Area - no defendant in *Seven Springs I* can be said to have done anything wrong in that case, and certainly nothing actionable in this case or otherwise.

The thrust of this action is that Plaintiff wants TNC and these Defendants - the very same defendants who are defending themselves in *Seven Springs I* - to stop defending themselves in *Seven Springs I*, to stop taking the "positions" they do in that case, and to simply concede that Plaintiff has the rights over Oregon Road which no Court has yet declared it to have.

In short, Seven Springs is attempting to bully TNC into giving up its position in *Seven Springs I* that Seven Springs does not have the easement rights it claims, and it does not have the right to right to turn the unpaved hiking trail that runs through the Nature Preserve into a private, paved roadway to benefit Seven Springs's desire to develop more homes than it has already been given permission to build.

In paragraph 27 of his affirmation, Plaintiff's counsel summarizes the point of this action:

> . . .the instant action simply seeks to assert Plaintiff's rights to damages against the Defendants, should it be determined that the Defendants have wrongfully prevented Plaintiff from using, and exercising its rights with respect to the Easement Area. [Emphasis added.]

In paragraph 30, counsel states that:

> The instant action is based on Plaintiff's claim to the Easement over Oregon Road and for money damages based on Defendants' intentional acts in interfering with Plaintiff's property rights and use of the Easement. Such actions include, but are not limited to, Defendants action in seeking injunctive relief against the Plaintiff [in *Seven Springs I*], and precluding Plaintiff from exercising its full rights to ingress and egress over the Easement.

Stated simply, Plaintiff seeks to hold Defendants liable in damages for having procured the PI Order (the preliminary injunction) that was issued by Justice Bellantoni in *Seven Springs I* in April 2008 (*see* Donellan Aff., ¶23), although it characterizes its "claim" as one for *prima facie* tort.

But the PI Order (TNC Ex. 3) is not nearly so broad as Plaintiff argues in this Court. The PI Order enjoins Plaintiff from:

> (a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (I) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and
>
> (b) performing any work upon any land owned by TNC, including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes

or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal);

TNC sought, and the Court granted, the PI Order to maintain the *status quo*, and to continue the use of the Nature Preserve as such.

Plaintiff simply cannot contend - although it attempts to do so in this case - that the "position" TNC has taken in its defense of *Seven Springs I*, and its procurement of the PI Order, were motivated solely by "disinterested malevolence" for Plaintiff.

TNC is a nonprofit organization which had and has but one objective: to preserve the Nature Preserve in its current, natural state, as it is required to do under the terms and conditions imposed by its grantor. That is consistent with TNC's Mission, as set forth in its charter, or its Statement Of Election To Accept.[3] *See* page 1, *supra*.

The conditions under which the Nature Preserve was given to TNC require that TNC maintain the lands as a nature preserve, and they further provide that if "TNC shall at any time fail to continue to maintain all or any part of the [Nature Preserve] as a natural preserve or in a way which will conserve its essential natural character," TNC will have to re-convey the property back to the grantor. (*See* TNC Ex. 7)

Plaintiff's complaint in this action, and its instant motion, seek nothing more than to circumvent the facts that Plaintiff (a) has no claim against TNC (or, indeed, against any of the defendants), and (b) is precluded by settled New York law from using the disfavored claim for *prima facie* tort to assert an otherwise impermissible and unavailable claim.

For the reasons set forth in more detail below, Plaintiff's motion for leave to serve the

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[3] http://www.nature.org/aboutus/leadership/art15495.html

amended complaint must be denied as futile because there is no basis for a claim for *prima facie* tort; there is no independent cause of action for damages resulting from the entry of an order restraining and enjoining it from trespassing on TNC's land; and any such claim for damages is, as a matter of law, to be prosecuted in the action in which the PI Order was entered and any damages are limited to the amount of the undertaking given in connection with such PI Order.[4]

Moreover, Plaintiff's claim - although dressed up as one for *prima facie* tort - is in essence a claim for slander of title, because Plaintiff claims that it has been harmed by the facts that TNC (and the other defendants) has taken the position in *Seven Springs I* that Plaintiff does not have the rights to use Oregon Road that it now claims to have, and procured the PI Order to prevent a continuing trespass by Plaintiff.[5]

Plaintiff admits that this action is but a repeat of *Seven Springs I.* In paragraph 40 of his affirmation, Plaintiff's counsel states that: "This action simply seeks to assert Plaintiff's right to monetary damages as a result of Defendants' action, and as set forth in the 2006 Action" - *i.e.* *Seven Springs I.* Indeed, for statute of limitations purposes, Plaintiff seeks to have any claim asserted herein deemed to "relate back" to the commencement of *Seven Springs I*, contending that "Plaintiff's claim in this action is consistent with the claims asserted by Plaintiff in" *Seven Springs I.* (Donellan Aff., ¶42)

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[4] *See generally Bonded Concrete, Inc. v. Town of Saugerties*, 42 A.D.3d 852, 841 N.Y.S.2d 152 (3rd Dep't 2007); *see* pages 12-13, *infra.*

[5] Of course, Plaintiff did not always claim to have any rights to use that portion of Oregon Road which is within the so-called Easement Area. In a prior iteration, when Plaintiff sought (unsuccessfully) to develop a golf course on its property, Plaintiff and its professionals took the position that TNC: "fully owns the entire road bed south of Seven Springs....[T]he owners of the Seven Springs site have no rights to utilize any part of this portion of the roadway." (*See* TNC Ex. 8)

For the reasons set forth, *infra*, the Complaint should be dismissed and Plaintiff's cross-motion for leave to serve and file a proposed amended complaint should be denied.

Argument

Point I

THE AMENDED COMPLAINT MUST BE DENIED AS FUTILE

Although leave to amend a pleading should be freely granted, this Court is not required to permit futile amendments which may - and in this case certainly will - lead to needless litigation. *Castillo v. Starrett City, Inc.*, 4 A.D.3d 320, 772 N.Y.S.2d 74 (2nd Dep't 2004); *Saferstein v. Mideast Systems, Ltd.*, 143 A.D.2d 82, 531 N.Y.S.2d 333 (2nd Dep't 1988); *General Motors Acceptance Corp. v. Shickler*, 96 A.D.2d 926, 466 N.Y.S.2d 369 (1st Dep't 1983).

In this case, leave to amend should be denied as futile because the proposed amended complaint suffers from the same defects as does the original Complaint, and none of those defects is cured or corrected by the proposed amendment.

Plaintiff argues that the proposed Amended Complaint asserts one cause of action: for *prima facie* tort. (Pltf's Mem., at 4)

Plaintiff is wrong.

A. The Elements of *Prima Facie* Tort

The cause of action for *prima facie* tort "was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a catch all alternative for every cause of action which is not independently viable,"

Epifani v. Johnson, 65 A.D.3d 224, 232, 882 N.Y.S.2d 234 (2nd Dep't 2009); *see also Etzion v. Etzion*, 62 A.D.3d 646, 651-652, 880 N.Y.S.2d 79 (2nd Dep't 2009); *Lancaster v. Town of E. Hampton*, 54 A.D.3d 906, 908, 864 N.Y.S.2d 537 (2nd Dep't 2008).

The elements necessary to plead a claim of *prima facie* tort are: "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143, 490 N.Y.S.2d 735 (1985); *Curiano v. Suozzi*, 63 N.Y.2d 113, 117, 480 N.Y.S.2d 466 (1984); *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 332, 464 N.Y.S.2d 712 (1983). "This means that 'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another'." *Id.*, 59 N.Y.2d at 333; *DeNaro v. Rosalia*, 59 A.D.3d 584, 873 N.Y.S.2d 697 (2nd Dep't 2009). Where the defendant's conduct is motivated or committed at least partly in furtherance of legitimate motives, there is no claim for *prima facie* tort.

In order to make out a claim sounding in *prima facie* tort, Plaintiff must "allege that disinterested malevolence was the sole motivator for the conduct of which [it] complain[s]." *R.I. Island House, LLC v. North Town Phase II Houses, Inc.*, 51 A.D.3d 890, 896, 858 N.Y.S.2d 372 (2nd Dep't 2008); *Epifani v. Johnson*, 65 A.D.3d 224, 232, 882 N.Y.S.2d 234 (2nd Dep't 2009); *EECP Centers of America, Inc. v. Vasomedical, Inc.*, 265 A.D.2d 372, 696 N.Y.S.2d 837 (2nd Dep't 1999).

1. The proposed pleading does not allege that TNC or any of the Defendants did anything actionable

In this case, the proposed amended complaint alleges, upon information and belief, that

"Defendants' acts are willful, without reasonable or probable cause and are without basis in law or fact, and disinterested malevolence is the sole motivation for Defendant's actions." (Proposed Amd. Cplt., ¶41) But such a conclusory allegation is insufficient where, as here, it is (a) not well-pleaded: it does not allege any specific acts committed by any of the Defendants, and it does not contain facts which allege, or from which an inference may be drawn, that TNC (or any of the Defendants herein) acted solely out of disinterested malevolence, *Simaee v. Levi*, 22 A.D.3d 559, 802 N.Y.S.2d 493 (2nd Dep't 2005) (pleading must "allege facts indicating that the defendants' actions were motivated by disinterested malevolence"); *Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc.*, 5 A.D.3d 352, 774 N.Y.S.2d 56 (2nd Dep't 2004); *EECP Centers of America, Inc.*, *supra* (complaint dismissed for failing to allege any facts to indicate that the sole motivation for the appellant's actions was disinterested malevolence); and (b) contradicted by the allegations in the proposed amended complaint which establish that TNC's actions in seeking to procure, and procuring, the PI Order, were motivated to to protect its interest in its property - the Meyer Nature Preserve! *Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co. LP*, 60 A.D.3d 434, 874 N.Y.S.2d 440 (1st Dep't 2009) (existence of other interest or motive precludes *prima facie* tort claim); *WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 590 N.Y.S.2d 460 (1st Dep't 1992) (affirming dismissal of claim for *prima facie* tort where there were no well-pleaded allegations to support the conclusory allegation that disinterested malevolence was the sole motivation for defendant's actions)[6]; *Fallon v. McKeon*, 230 A.D.2d

[6] "Central to the cause of action for prima facie tort is that the defendant's intent have been solely to injure plaintiff, *i.e.*, that defendant have acted from 'disinterested malevolence' (citations omitted). Here, the complaint states, in a conclusory fashion, unsupported by factual allegations, that defendants' sole intent was to harm plaintiffs. . . . Although on a motion addressed to the sufficiency of a complaint, the facts pleaded are presumed to be true and

629, 646 N.Y.S.2d 230 A.D.2d 629, 646 N.Y.S.2d 109 (1st Dep't 1996) (claim for *prima facie* tort dismissed in absence of allegations of facts tending to show that disinterested malevolence was the sole motivation for defendant's actions).

Where, as here, other motives exist, such as profit, self-interest, or business advantage - or the maintenance and preservation of the Meyer Nature Preserve - a claim for *prima facie* tort does not lie. *Roberts, supra*, 92 A.D.2d at 444, *citing Squire Records v. Vanguard Recording Soc.*, 25 A.D.2d 190, 268 N.Y.S.2d 251 (1st Dep't 1966), *aff'd* 19 N.Y.2d 797, 279 N.Y.S.2d 737 (1967); *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 398 N.Y.S.2d 864 (1977); *Hessel v. Goldman, Sachs & Co.*, 281 A.D.2d 247, 722 N.Y.S.2d 21 (1st Dep't 2001).

Plaintiff's pleading defies simple logic and common-sense: how can the acts of a defendant ever be considered to be motivated solely by disinterested malevolence, when such a defendant - by definition - has at least the objective and interest of (a) defeating the claim asserted against it (in this case, *Seven Springs I*) and (b) protecting its interest in its own property (and Plaintiff acknowledged in *Seven Springs I* that TNC's effort to procure the PI Order was to protect TNC's claimed interest in its own property).[7] *See Griffin v. Tedaldi*, 228 A.D.2d 554, 645 N.Y.S.2d 40 (2nd Dep't 1996).

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accorded every favorable inference. . . , nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *WFB Telecommunications, Inc., supra, quoting Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 570 N.Y.S.2d 799 (1st Dep't 1991), *quoting Roberts v. Pollack*, 92 A.D.2d 440, 444, 461 N.Y.S.2d 272 (1st Dep't 1983).

[7] *See* Affirmation of Alfred Donellan, dated March 17, 2008 (¶10), submitted in *Seven Springs I*: "TNC claims that Seven Springs (or its agents) are somehow entering on TNC's property and clear-cutting, regrading and otherwise altering the terrain within the boundaries (and proximate to) Oregon Road."

The proposed amended complaint does not allege that TNC, for example, engaged in any specific act - other than taking a "position" in *Seven Springs I*, and seeking the PI Order. Such acts, as we demonstrated in TNC's moving memorandum, are privileged precisely because they were statements or actions taken in litigation, in *Seven Springs I.*

2. ***Anything TNC did - the positions it took in Seven Springs I and its procurement of the PI Order - is absolutely privileged***

As a matter of law, TNC's actions and conduct - (a) defending itself in *Seven Springs I*, (b) asserting a counterclaim for trespass in *Seven Springs I*, and (c) seeking and procuring the PI Order in *Seven Springs I* - are absolutely privileged,[8] and cannot form the basis of a claim for *prima facie* tort. *Lerwick v. Kelsey*, 24 A.D.3d 931, 807 N.Y.S.2d 147 (3rd Dep't 2005); *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 773 N.Y.S.2d 348 (1st Dep't 2004); *Martinson v. Blau*, 292 A.D.2d 234, 738 N.Y.S.2d 572 (1st Dep't 2002) (affirming dismissal of *prima facie* tort claim that defendant gave false testimony as a witness in a New Jersey court proceeding); *Carniol v. Carniol*, 288 A.D.2d 421, 733 N.Y.S.2d 485 (2nd Dep't 2001); *Jaeger v. Board of Educ. of Hyde Park Cent. School Dist.*, 258 A.D.2d 507, 685 N.Y.S.2d 278 (2nd Dep't 1999); *Rabiea v. Stein*, 21 Misc. 3d 1149(A), 875 N.Y.S.2d 823 (Sup. Ct. Nassau Co. 2008); *Gondal*

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[8] In any event, actions taken and statements made in litigation are absolutely privileged, *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); *Park Knoll Assoc. v. Schmidt*, 59 N.Y.2d 205, 209, 464 N.Y.S.2d 424 (1983); *Martirano v. Frost*, 25 N.Y.2d 505, 307 N.Y.S.2d 425 (1969); *Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); *Able Energy, Inc. v. Marcum & Kliegman LLP*, ___ A.D.3d ___, ___, N.Y.S.2d ___, 2010 WL 87470 (1st Dep't Jan. 12, 2010); *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.23d 136, 615 N.Y.S.2d 410 (2nd Dep't 1994); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 828 N.Y.S.2d 315 (1st Dep't 2007) ("the principle underlying the absolute privilege for judicial proceedings is that 'the proper administration of justice depends upon freedom of conduct on the part of counsel and parties to the litigation,' which freedom 'tends to promote an intelligent administration of justice'"); *Sinrod v. Stone*, 20 A.D.3d 560, 799 N.Y.S.2d 273 (2nd Dep't 2005), and they are not subject to collateral review in another plenary action.

Asset Management v. New York Stock Exchange, 22 Misc. 3d 1108(A), 880 N.Y.S.2d 223 (Sup. Ct. N.Y. Co. 2004).

Indeed, given that New York does not permit a claim for *prima facie* tort predicated on the malicious institution of a prior civil action, *Curiano, supra*; *Lemberg v. John Blair Communications, Inc.*, 251 A.D.2d 205, 674 N.Y.S.2d 355 ([st] Dep't 1998); *1109580 Ontario, Inc. v. Bear, Stearns & Co., Inc.*, 2003 WL 470308 (S.D.N.Y. Feb. 25, 2003), it certainly will not recognize a claim for wrongful defense of a prior - and as yet unresolved - action.

Nor is there any allegation in the proposed amended complaint that Plaintiff had an agreement with any of the municipal authorities (*i.e.* Bedford or North Castle), of which TNC was aware and with which TNC is alleged to have intentionally interfered. .Plaintiff's development proposal in Bedford does not contemplate or require access over the so-called Easement Area or Oregon Road,[9] and Plaintiff voluntarily withdrew its development proposal in North Castle.[10]

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[9] "[S]even lots for new single-family residences, one lot for the existing "Nonesuch" home, one lot for a private equestrian facility, and one lot to be owned by a homeowner's association on which stormwater management basins will be located. The Meyer estate house will remain on the existing 103.8-acre lot in the Town of North Castle, with access over its existing driveway from a proposed new private road in Bedford. <u>No new development is currently proposed in the Town of North Castle or the Town of New Castle, and no access to the site from North Castle or New Castle is currently proposed</u>."

http://www.bedfordny.info/html/pdf/planning/2009%20Seven%20Springs%20FEIS.pdf (Emphasis added.)

[10] By letter dated August 10, 2007, Plaintiff's counsel advised the North Castle Planning Board that Plaintiff "hereby withdraws the application made to the Planning Board for approval of a subdivision of the portion of the property that is within the Town of North Castle." (*See* TNC Ex. 9)

3. *The proposed pleading improperly seeks to circumvent the unavailability of a cause of action on the PI Order in Seven Springs I*

The pleadings in ths case - notwithstanding Plaintiff's attempt to characterize them as asserting a claim for *prima facie* tort - set forth allegations which purport to assert a claim, if anything, for wrongful issuance of the PI Order. But it is well-settled that "[p]rima facie tort was designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, and not to provide a 'catch all' alternative for every cause of action which cannot stand on its legs." *Lancaster v. Town of East Hampton*, 54 A.D.3d 906, 864 N.Y.S.2d 537 (2nd Dep't 2008). Plaintiff may not recast a claim that is otherwise unavailable as a matter of New York law as one for *prima facie* tort. *See e.g. Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983); 2 PJI 3:7 *Intentional Torts - Interference with Person or Property - Prima Facie Tort* (2009 ed.) ("*2 PJI*").

Plaintiff's proposed pleading - as well as the affirmation of its counsel and the affidavit of its principal, Donald Trump - make plain that this action seeks damages for what Plaintiff characterizes as the wrongful issuance of the PI Order. But casting its pleading as one for *prima facie* tort is an impermissible attempt to circumvent the fact that there is no cause of action for wrongful issuance of a preliminary injunction, and that Plaintiff's only remedy is one for damages under the undertaking - should Plaintiff be able to prove in *Seven Springs I* that the PI Order was improperly issued. *Margolies v. Encounter, Inc.*, 42 N.Y.2d 475, 398 N.Y.S.2d 877 (1977); *Bonded Concrete, Inc., supra*; *Town of Putnam Valley v. Cabot*, 50 A.D.3d 775, 856 N.Y.S.2d 166 (2nd Dep't 2008).

TNC is not subject to liability for having sought or procured the PI Order, except as and

under - and as limited by - the $100,000 undertaking it gave as required by the PI Order. Under settled New York law, absent an undertaking there is no right to recover for damage resulting from the issuance of a preliminary injunction. *Reingold v. Bowins*, 34 A.D.3d 667, 826 N.Y.S.2d 316 (2nd Dep't 2006), *citing J.A. Preston Corp. v. Fabrication Enters.*, 68 N.Y.2d 397, 401, 509 N.Y.S.2d 520 (1986). And even if it is ultimately determined that TNC was not entitled to issuance of the PI Order, Plaintiff's "recovery of resulting damages attributable to the injunction will be limited to the amount of the undertaking as fixed by the court (citations omitted); *see also* CPLR 6312[b]), *i.e.*, the undertaking is 'the source and measure of liability'." *Bonded Concrete, Inc., supra, citing City of Yonkers v. Federal Sugar Ref. Co.*, 221 N.Y. 206, at 209 (1917); *Reingold, supra.*

In short, this entire action is but an effort to circumvent the fact that the remedy Plaintiff seeks is unavailable under New York law, and it is not made available by the creative efforts of its counsel to call its claim by a different name.

4. The proposed pleading contains no particularized allegation of special damages

The proposed amended complaint woefully fails to allege any cognizable special damages.

Special damages are the only type of damages recoverable in an action for *prima facie* tort, and they must be alleged "with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts'." *Epifani, supra, quoting Ginsberg v. Ginsberg*, 84 A.D.2d 573, 574, 443 N.Y.S.2d 439 (2nd Dep't 1981).

Special damages are ordinarily for injuries to a trade, occupation, professional reputation or property, and the term generally comprehends interference with some form of contractual

relation. *2 PJI, supra.*

Plaintiff claims that it sustained the following damages:

1. $5 million for its inability to use its purported easement;

2. $50 million for the diminution in value of the Seven Springs Parcel; and

3. $5 million for Plaintiff's inability to access the Seven Springs Parcel from the south over Oregon Road.

(Proposed Amd Cplt., ¶50)

These are all general damages and, thus, they are not recoverable in a claim for *prima facie* tort. General allegations of loss, especially when supported by damages set forth in round numbers without particularization, are not recoverable in a claim for *prima facie* tort. *Drug Research Corp. v. Curtis Pub. Co.*, 7 N.Y.2d 435, 441, 199 N.Y.S.2d 33 (1960); *Emergency Enclosures, Inc. v. National Fire Adjustment Co., Inc.*, 68 A.D.3d 1658, ___ N.Y.S.2d ___ (4th Dep't 2009) ("In pleading special damages, actual losses must be identified and causally related to the alleged tortious act"...."[G]eneral allegations of lost sales from unidentified lost customers are insufficient"); *Epifani, supra*; *Rall v. Hellman*, 284 A.D.2d 113, 726 N.Y.S.2d 629 (1st Dep't 2001); *Wasserman v. Maimonides Medical Center*, 268 A.D.2d 425, 702 N.Y.S.2d 88 (2nd Dep't 2000); *Leather Dev. Corp. v. Dun & Bradstreet, Inc.*, 15 A.D.2d 761, 224 N.Y.S.2d 513 (1st Dep't 1962) ("damages pleaded in such round sums, without any attempt at itemization, must be deemed allegations of general damages"), *aff'd* 12 N.Y.2d 909, 237 N.Y.S.2d 628 (1963); *2 PJI, supra.*

The loss must be "specific and measurable." *Freihofer, supra*, 65 N.Y.2d at 143 (1985); *Epifani, supra*; *Cardo v. Board of Managers, Jefferson Village Condo 3*, 29 A.D.3d 930, 931,

817 N.Y.S.2d 315 (2nd Dep't 2006).

Accordingly, the proposed amended complaint fails to allege special damages, and it fails to allege special damages with the requisite particularity.

B. The Purported Claim is Time-Barred

Even assuming, *arguendo*, that Plaintiff has stated a claim for *prima facie* tort - and it has not - such a claim is subject to a one-year statute of limitations and is time-barred.

First, a claim for *prima facie* tort is subject to a one-year statute of limitation. CPLR 215(3); *Dinerman v. City of New York Admin. for Children's Services*, 50 A.D.3d 1087, 857 N.Y.S.2d 221 (2nd Dep't 2008); *Benyo v. Sikorjak*, 50 A.D.3d 1074, 858 N.Y.S.2d 215 (2nd Dep't 2008); *Russek v. Dag Media Inc.*, 47 A.D.3d 457, 851 N.Y.S.2d 399 (1st Dep't 2008); *Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368, 835 N.Y.S.2d 57 (1st Dep't 2007); *Peerless Abstract Corp. v. Seltzer*, 35 A.D.3d 423, 824 N.Y.S.2d 717 (2nd Dep't 2006); *Yong Wen Mo v. Gee Ming Chan*, 17 A.D.3d 356, 792 N.Y.S.2d 589 (2nd Dep't 2005).

Plaintiff contends that because it claims to seek damages for purported injury to its economic interests, it's claim is subject to a 3-year statute of limitations (Pltf's Mem., at 10), *citing Jemison v. Crichlow*, 139 A.D.2d 332, 531 N.Y.S.2d 919 (2nd Dep't 1988). But to the extent Plaintiff's claim is based on the "position" that TNC took in *Seven Springs I* - even assuming such "position" is not privileged - the claim seeks damages for injury to the reputation of Plaintiff or its title in the Seven Springs Parcel and its rights (if any) to use Oregon Road within the Easement Area. That is a claim for slander of title, regarding the nature or extent of Plaintiff's title in and to the Easement Area. *Fink v. Shawangunk Conservancy*, 15 A.D.3d 754, 790 N.Y.S.2d 249 (3rd Dep't 2005). Such a claim is subject to a one-year statute of limitations.

39 College Point Corp. v. Transpac Capital Corp., 27 A.D.3d 454, 810 N.Y.S.2d 520 (2nd Dep't 2006); *Hanbidge v. Hunt*, 183 A.D.2d 700, 583 N.Y.S.2d 288 (2nd Dep't 1992) ("A cause of action sounding in slander of title is governed by a one-year Statute of Limitations"). Of course, a *prima facie* tort claim is not permitted where the purpose is to circumvent an already expired statute of limitations. *2 PJI 3:7, supra* ("nor may a plaintiff avoid a statute of limitations by denominating the claim a prima facie tort"); *Havell v. Islam*, 292 A.D.2d 210, 739 N.Y.S.2d 371 (1st Dep't 2002); *Entertainment Partners Group, Inc. v. Davis*, 198 A.D.2d 63, 603 N.Y.S.2d 439 (1st Dep't 1993); *Ramsay v. Mary Imogene Bassett Hosp.*, 113 A.D.2d 149, 495 N.Y.S.2d 282 (3rd Dep't 1985).

The proposed amended complaint does not identify a single act that was committed within one-year of the date (September 22, 2009) on which this action was filed. The PI Order was entered on April 14, 2008, much more than one-year before this action was commenced. Plaintiff does not identify that any act - not a single act - was undertaken, performed or committed by TNC or any of the Defendants after the date the PI Order was entered, or within a year of the date on which this action was commenced. Accordingly, the purported claim is time-barred.

Plaintiff's argument that this action is subject to a 3-year statute of limitations because it seeks damages for injuries to economic interests rather than to Plaintiff's reputation (Pltf's Mem., at 9-10), is misplaced. No special damages are alleged or identified, and there is no allegation that Plaintiff had, or lost, a single contract to sell or otherwise dispose of or use any portion of its lands.

Second, Plaintiff appears to contend that it is entitled to have this *prima facie* tort claim

relate back to the date when *Seven Springs I* was commenced, on May 15, 2006. That argument is, frankly, ridiculous, because the facts and alleged acts which underlie the *prima facie* tort claim did not arise until years after *Seven Springs I* was commenced, and after Defendants determined to defend themselves against Plaintiff's claims and allegations in *Seven Springs I.*

CPLR 203(f) provides:

> *Claim in amended pleading.* A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

It is Plaintiff's burden to establish the applicability of the relation back doctrine provided for in CPLR 203(f). *Cardamone v. Ricotta*, 47 A.D.3d 659, 660, 850 N.Y.S.2d 511 (2nd Dep't 2008); *Nani v. Gould*, 39 A.D.3d 508, 509, 833 N.Y.S.2d 198 (2nd Dep't 2007).

There simply is no basis on which the purported *prima facie* tort claim could have been asserted in *Seven Springs I*, and there is basis in law for the proposition that an amended pleading in a subsequent action can be deemed to relate back to the commencement of a separate, prior action.

Point II

THE PROPOSED AMENDED COMPLAINT
CONTAINS NO BASIS FOR PUNITIVE DAMAGES

The proposed amended complaint offers no greater basis for punitive damages than does the original Complaint. Even Plaintiff's memorandum demonstrates the complete lack of any

basis for punitive damages in this case.

Plaintiff's threat to seek punitive damages from TNC - a venerable charitable organization - for defending itself in *Seven Springs I* is the height of *chutzpah.*[11] *See Gemveto Jewelry Co. v. Jeff Cooper, Inc.*, 568 F.Supp. 319, 328 (S.D.N.Y. 1983), *vacated and remanded on other grounds*, 800 F.2d 256 (2d Cir. 1986) ("The assertion by the defendants of these claims against plaintiff who was trying to protect its patents against defendants' unethical conduct is an outstanding example of chutzpah to the nth degree").

It is Plaintiff, not TNC, that has engaged in conduct that is punitive and sanctionable. Plaintiff seeks to prevent TNC from defending its property rights and acting consistent with its Mission and its charter as a charitable, nonprofit organization dedicated to preserving "the plants, animals and natural communities that represent the diversity of life on Earth."

Plaintiff, for its part, seeks to build more houses than it has the right to build. For this, Plaintiff turns the world upside-down and asks this Court to allow Plaintiff to sue TNC and to subject TNC to punitive damages for doing nothing more than defending its own property rights.

TNC has done nothing more than to defend itself and its property in *Seven Springs I*, and its historic, charitable Mission. We are unaware of any case which has held that any party - and certainly not a charitable organization - may be held liable in punitive damages for defending itself in another litigation.

As we pointed out in TNC's moving memorandum, although Plaintiff alleges that TNC

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[11] *Burns v. Burns,* 2001 WL 1568402 (Sup. Ct. Nassau Co., Sept. 7, 2001) ("Chutzpah", to those who may not know, is a Yiddish word. In the affirmative, it may be defined as moxie or guts. In the negative, it implies unbelievable gall, nerve or presumption"); *Ulloa v. City of New York*, 193 A.D.2d 487, 597 N.Y.S.2d 386 (1st Dep't 1993); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2nd Cir. 2009).

and the other defendants have acted maliciously or with malice, there is no factual allegation - well-pleaded or otherwise - that any of the Defendants has done anything that is or could remotely be considered as malicious.

In its memorandum (at page 11), Plaintiff contends that punitive damages are available in a case where the defendant's conduct "has the character of outrage frequently associated with crime," *quoting Prozeralik v. Capital Cities Communications*, 82 N.Y.2d 466, 479, 605 N.Y.S.2d 218 (1993). But, in that case, the Court of Appeals instructed that punitive damages are not available in cases simply where the defendant has acted maliciously. *Id.*, at 478. Rather, the Court of Appeals quoted from Professor Prosser to identify the high burden that a plaintiff must allege and prove in order to seek and obtain punitive damages:

> "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Prosser and Keeton, Torts § 2, at 9-10 [5th ed. 1984]).

There is no such conduct here. Indeed, so benign is the conduct at issue in this case that Plaintiff has been singularly unable to allege or describe what it is that it claims TNC and the other defendants have done in this case. The only conduct that warrants the imposition of punitive damages is that of Plaintiff in filing and perpetuating this unjustified action.

Plaintiff later relies on *Anniskiewicz v. Harrison*, 291 A.D.2d 829, 737 N.Y.S.2d 316 (4th Dep't 2002) for the proposition that obstruction of an easement justifies the imposition of punitive damages. (*See* Pltf's Mem., at 12) In that case, the court upheld the award of punitive

damages because there was evidence that defendant engaged in "malicious conduct. . .which was intended to intimidate plaintiff." 291 A.D.2d, at 829.

There is no such evidence here. To the contrary, in this case it is the Plaintiff - not the Defendants - who is engaging in conduct intended to intimidate. Plaintiff's reliance on *Chlystun v. Kent*, 185 A.D.2d 525, 586 N.Y.S.2d 410 (3rd Dep't 1992) is also misplaced. In that case, the Appellate Division sustained the award of punitive damages in a trespass action where the defendant engaged in offensive conduct (having nothing to do with its defense of a prior action),[12] but reversed it where such offensive conduct was not demonstrated. *Id.*

The Second Department has repeatedly, and recently rejected claims for punitive damages where "the factual allegations set forth in the complaint do not evidence that the defendant engaged in conduct which rises to the high level of moral culpability necessary to support an award of punitive damages." *99 Cents Concepts, Inc. v. Queens Broadway, LLC*, ___ A.D.3d ___, ___ N.Y.S.2d ___, 2010 WL 378121 (2nd Dep't Feb. 2, 2010); *Fragrancenet.com, Inc. v. Fragrancex.com, Inc.*, 68 A.D.3d 1051, 890 N.Y.S.2d 357 (2nd Dep't 2009) ("Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations'").

---

[12] "In this case plaintiff testified that defendants used her property repeatedly without permission, widened the roadway and traveled at great speed, showering her with dust and cinders on one occasion. She also said that Kent II repeatedly used abusive language toward her. We perceive no reason to reduce the award for punitive damages for trespass." 185 A.D.2d at 527.

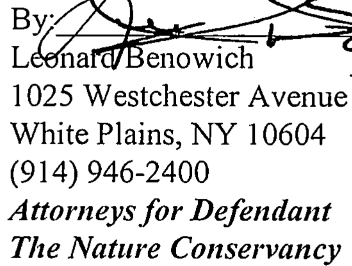
Conclusion

TNC's motion should be granted, and Plaintiff's cross-motion should be denied.

The Complaint should be dismissed in all respects.

Dated: February 19, 2010

BENOWICH LAW, LLP



By: Leonard Benowich
1025 Westchester Avenue
White Plains, NY 10604
(914) 946-2400
Attorneys for Defendant
The Nature Conservancy

S:\Main Files\TNC\Seven Springs II\Lit Documents\Dismiss\Reply mem.wpd

Certificate of Service (by U.S. Mail)

LEONARD BENOWICH, an attorney duly admitted to practice in this Court, hereby affirms, under the penalty of perjury, that on February 19, 2009, I served a true copy of the foregoing **Reply Affirmation In Further Support of Motion To Dismiss And In Opposition To Motion For Leave To Amend** and **TNC's Memorandum Of Law In Support Of Its Motion To Dismiss Complaint And In Opposition To Plaintiff's Motion For Leave To Amend Its Complaint** upon the following counsel:

Bradley Wank (bdw@ddw-law.com)
DelBello Donnellan Weingarten, Wise & Wiederkehr, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

Lois Rosen (lrosen@oxmanlaw.com)
OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for Defendants Noel B. and Joann Donohoe

Janine Mastellone (janine.mastellone@wilsonelser.com)
WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP
3 Gannett Drive
White Plains, New York 10604-3407
Attorneys for Defendants Robert and Teri Burke

by e-mail; and by depositing a true copy thereof enclosed in a post-paid wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, addressed to the party and/or parties listed above.

Dated: February 19, 2009

Leonard Benowich

Poor Quality

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

FILED
JUN 2[illegible] 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC, Plaintiff, - against - THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE, Defendants.	x	**Index No.: 21162/09** **AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND**

JANINE A. MASTELLONE, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the following to be true under the penalty of perjury:

1. I am associated with the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, attorneys for the defendants, ROBERT BURKE and TERI BURKE ("the BURKE defendants"). I am familiar with the facts and circumstances of this matter, based upon a review of the file maintained by this office.

2. This Affirmation is respectfully submitted in further support of the BURKE defendants' application, for an Order pursuant to CPLR § § 3211(a)1, 7 and 3211(g), seeking dismissal of the plaintiff's complaint and in opposition to the plaintiff's cross-motion seeking leave to amend the complaint. As will be set forth more fully in the accompanying memorandum of law, the plaintiff's amended complaint is nothing more than an unsuccessful attempt to allegedly cure glaring defects in the purported claims asserted in the original complaint.

3. In sum, plaintiff's *prima facie* tort appears to be a request for relief relative to the issuance of a Preliminary Injunction in the 2006 action. As a matter of law, there is no cause of action for damages relative to the issuance of a preliminary injunction. Rather, plaintiff's remedy was to either to perfect his appeal or to pursue the undertaking posted in conjunction

with the Preliminary Injunctive Order. Attached hereto as Exhibit "1" is a copy of the plaintiff's Notice of Appeal relative to the issuance of the Preliminary Injunction Order.

4. Plaintiff's time to appeal has long since expired and as such, the plaintiff is attempting to circumvent the expiration of his appeal time by filing the instant baseless amended complaint.

5. Even if this Court finds that the plaintiff is not barred from asserting a claim for relief relative to the issuance of the preliminary injunction at the outset, plaintiff's purported claim is time barred and fails to state any legally cognizable claim against the BURKE defendants. Plaintiff simply cannot establish the necessary elements of a *prima facie* tort.

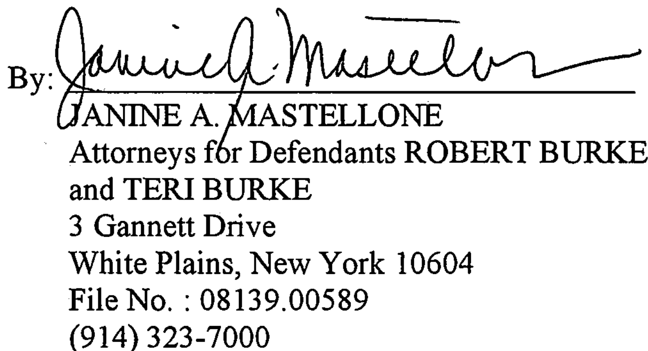
6. The BURKE defendants have not interfered or prevented the plaintiff from developing the subject parcel in any manner. A copy of the Findings Statement from the Town of Bedford is attached hereto as Exhibit "2".

WHEREFORE, it is respectfully requested that the plaintiff's cross-motion seeking leave to amend be denied and that the plaintiff's complaint be dismissed in its entirety and for such other, further and different relief as this Court deems just and proper.

Dated: White Plains, New York
February 19, 2010

Yours, etc.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP



By: JANINE A. MASTELLONE
Attorneys for Defendants ROBERT BURKE and TERI BURKE
3 Gannett Drive
White Plains, New York 10604
File No. : 08139.00589
(914) 323-7000

TO: DelBello Donellan Weingarten Tartaglia Wise & Wiederkehr, LLP
Attorneys for the Plaintiff
Attention: Alfred E. Donnellan, Esq.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE
Attention: John Kirkpatrick, Esq.
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

Benowich Law, LLP
Attorneys for Defendant THE NATURE CONSERVANCY
Attention: Leonard Benowich, Esq.
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

1

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SEVEN SPRINGS, LLC,

Plaintiff,

Index No. 9130/06

NOTICE OF APPEAL

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

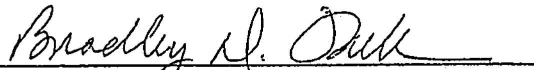
Defendants.

---X

PLEASE TAKE NOTICE that Plaintiff, SEVEN SPRINGS, LLC, by its attorneys DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, from each and every part of the Order of the Honorable Rory J. Bellantoni dated April 14, 2008 and entered in the office of the County Clerk of Westchester County on April 14, 2008.

Dated: White Plains, New York
May 9, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff



By: BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: Roosevelt & Benowich, LLP
Attorneys for Defendant
The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

1244370
0143500-001

Stephens Baroni Reilly & Lewis, LLP
Attorneys for Defendant
Town of North Castle
175 Main Street
White Plains, New York 10601
(914) 761-0300

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants Burke and Donohoe
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

RECEIVED
APR 1 4 2008
RORY J. BELLANTONI
COUNTY COURT CHAMBERS

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on April 14, 2008

PRESENT:

HON:

RORY J. BELLANTONI,

Acting Justice.

FILED
AND
ENTERED
ON 4-14 2008

---x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

---x

Index No. 9130/06

ORDER GRANTING
PRELIMINARY INJUNCTION

Defendant The Nature Conservancy ("TNC") having moved this Court, by order to show cause dated March 18, 2008, for a temporary restraining order and preliminary injunction ("Motion"), and this matter having come on to be heard before the Court on March 18, 2008 and on April 4, 2008, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the Order to Show Cause dated March 18, 2008, supported by the Affirmation of Leonard Benowich, Esq., dated March 13, 2008, the Affidavit of Amy Fenno, sworn to March 11, 2008, and the Affidavit of Jamie Norris, sworn to March 13, 2008, together with Exhibits 1-18 annexed thereto, and a

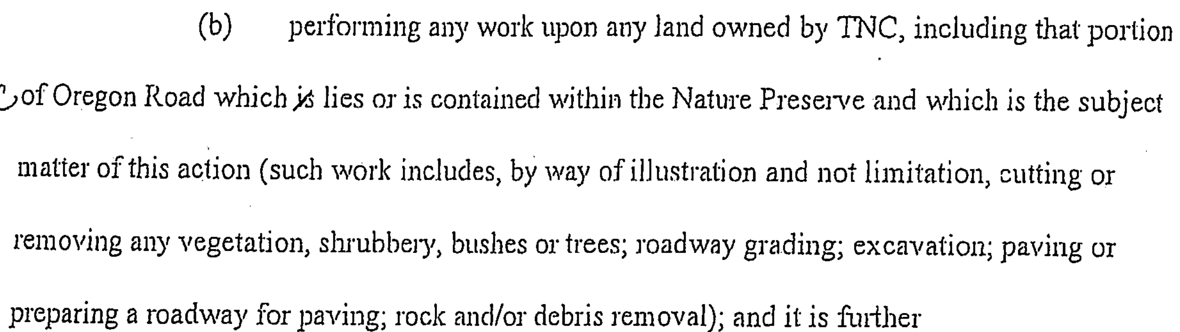
memorandum of law dated March 13, 2008, in support of the Motion; (2) the affidavit of Alfred Donnellan, Esq., sworn to March 17, 2008, and Exhibits A-E annexed thereto (on behalf of Plaintiff Seven Springs, LLC), and a memorandum of law dated March 17, 2008, in opposition to the Motion; (3) the Affidavit of Alfred Donnellan, Esq., sworn to March 26, 2008, and Exhibits A-G thereto (on behalf of Plaintiff Seven Springs, LLC) and a memorandum of law dated March 26, 2008, in opposition to the Motion; (4) the Reply Affirmation of Leonard Benowich, dated April 2, 2008, and Exhibits 19-22 annexed thereto, and a reply memorandum of law dated April 2, 2008, in support of the Motion; (5) the affirmation of John B. Kirkpatrick, Esq., sworn to April 2, 2008 (on behalf of defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe), in support of the Motion; and (6) the affirmation of Gerald D. Reilly, Esq., dated April 2, 2008 (on behalf of defendant The Town of North Castle), in support of the Motion; and the parties, by their respective counsel, having been heard on March 18, 2008 in support of and in opposition to TNC's application for a temporary restraining order; and the Court having issued a temporary restraining order on March 18, 2008, and having directed that the parties appear on April 4, 2008 for oral argument of that portion of the Motion which sought a preliminary injunction; and the parties, by their respective counsel, having appeared before this Court for oral argument with respect thereto; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, having rendered its decision on the record of the proceedings held on April 4, 2008;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that TNC's Motion for a preliminary injunction is granted; and it is further

ORDERED, that during the pendency of this action, Plaintiff, its agents, employees and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing, be and they hereby are preliminarily enjoined from:

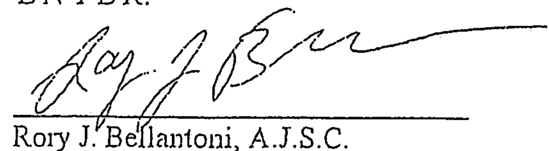
(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and



(b) performing any work upon any land owned by TNC, including that portion of Oregon Road which ~~is~~ lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal); and it is further

ORDERED, that within ten (10) days of service of a copy of this order with notice of entry, TNC shall give and file an undertaking in the amount of One Hundred Thousand Dollars ($100,000).

ENTER:



Rory J. Bellantoni, A.J.S.C.

C:\Main Files\TNC\SEVEN SPRINGS\Litigation\TRO\PI ORDER.wpd

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SEVEN SPRINGS, LLC,
Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,
Defendants.

Index No.: 9130/06

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type
- [X] Civil Action
- [ ] CPLR article 75 Arbitration
- [ ] CPLR article 78 Proceeding
- [ ] Special Proceeding Other
- [ ] Habeas Corpus Proceeding

Filing Type
- [X] Appeal
- [ ] Original Proceeding
- [ ] Transferred Proceeding
- [ ] CPLR 5704 Review

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review
- [ ] 1 Freedom of Information Law
- [ ] 2 Human Rights
- [ ] 3 Licenses
- [ ] 4 Public Employment
- [ ] 5 Social Services
- [ ] 6 Other

B. Business & Other Relationships
- [ ] 1 Partnership/Joint Venture
- [ ] 2 Business
- [ ] 3 Religious
- [ ] 4 Not-for-Profit
- [ ] 5 Other

C. Contracts
- [ ] 1 Brokerage
- [ ] 2 Commercial Paper
- [ ] 3 Construction
- [ ] 4 Employment
- [ ] 5 Insurance
- [ ] 6 Real Property
- [ ] 7 Sales
- [ ] 8 Secured
- [ ] 9 Other

D. Domestic Relations
- [ ] 1 Adoption
- [ ] 2 Attorney's Fees
- [ ] 3 Children - Support
- [ ] 4 Children - Custody/Visitation
- [ ] 5 Children - Terminate Parental Rights
- [ ] 6 Children - Abuse/Neglect
- [ ] 7 Children - JD/PINS
- [ ] 8 Equitable Distribution
- [ ] 9 Exclusive Occupancy of Residence
- [ ] 10 Expert's Fees
- [ ] 11 Maintenance/Alimony
- [ ] 12 Marital Status
- [ ] 13 Paternity
- [ ] 14 Spousal Support
- [ ] 15 Other

E. Miscellaneous
- [ ] 1 Constructive Trust
- [ ] 2 Debtor & Creditor
- [ ] 3 Declaratory Judgment
- [ ] 4 Election Law
- [ ] 5 Notice of Claim
- [ ] 6 Other

F. Prisoners
- [ ] 1 Discipline
- [ ] 2 Jail Time Calculation
- [ ] 3 Parole
- [ ] 4 Other

G. Real Property
- [ ] 1 Condemnation
- [X] 2 Determine Title
- [X] 3 Easements
- [ ] 4 Environmental
- [ ] 5 Liens
- [ ] 6 Mortgages
- [ ] 7 Partition
- [ ] 8 Rent
- [ ] 9 Taxation
- [ ] 10 Zoning
- [ ] 11 Other

H. Statutory
- [ ] 1 City of Mount Vernon Charter §§ 120, 127-f, or 129
- [ ] 2 Eminent Domain Procedure Law § 207
- [ ] 3 General Municipal Law § 712
- [ ] 4 Labor Law § 220
- [ ] 5 Public Service Law §§ 128 or 170
- [ ] 6 Other

I. Torts
- [ ] 1 Assault, Battery, False Imprisonment
- [ ] 2 Conversion
- [ ] 3 Defamation
- [ ] 4 Fraud
- [ ] 5 Intentional Infliction of Emotional Distress
- [ ] 6 Interference with Contract
- [ ] 7 Malicious Prosecution/ Abuse of Process
- [ ] 8 Malpractice
- [ ] 9 Negligence
- [ ] 10 Nuisance
- [ ] 11 Products Liability
- [ ] 12 Strict Liability
- [ ] 13 Trespass and/or Waste
- [ ] 14 Other

J. Wills & Estates
- [ ] 1 Accounting
- [ ] 2 Discovery
- [ ] 3 Probate/Administration
- [ ] 4 Trusts
- [ ] 5 Other

V2.0.060293

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Appeal

Paper Appealed From (check one only):

☐ Amended Decree	☐ Determination	☑ Order	☐ Resettled Order
☐ Amended Judgment	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme	County: Westchester
Dated: April 14, 2008	Entered: April 14, 2008
Judge (name in full): Rory J. Bellantoni	Index No.: 9130/06
Stage: ☒ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☒ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed. Defendant The Nature Conservancy ("TNC") moved for a temporary restraining order and preliminary injunction pursuant to CPLR §6301 restraining and enjoining Plaintiff, its agents, employees, and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing from:(a) entering upon the lands owned by [TNC] and maintained by [TNC] as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon the same, and (b) performing any work upon any land owned by [TNC] including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action. The Order of the lower Court granted TNC's motion, and directed TNC to file an undertaking in the amount of $100,000.00.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

Whether the Court below erred in granting TNC's motion?

Whether TNC demonstrated its right to injunctive relief by establishing a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor?

Whether the lower court erred in limiting the amount of the undertaking required to be filed by TNC to $100,000.00.

Poor Quality

Issues Continued:

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	Seven Springs, LLC	Plaintiff	Appellant
2	The Nature Conservancy	Defendant	Respondent
3	Realis Associates	Defendant	Non-Party
4	The Town of North Castle	Defendant	Respondent
5	Robert Burke and Teri Burke	Defendant	Respondent
6	Noel B. Donohoe and Joann Donohoe	Defendant	Respondent
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Poor Quality

Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
Address: One North Lexington Avenue
City: White Plains State: NY Zip: 10601 Telephone No.: 914-681-0200
Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 1

Attorney/Firm Name: Benowich Law, LLP
Address: 1025 Westchester Avenue
City: White Plains State: NY Zip: 10604 Telephone No.: 914-946-2400
Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 2

Attorney/Firm Name: Stephens Baroni Reilly & Lewis, LLP
Address: 75 Main Street
City: White Plains State: NY Zip: 10601 Telephone No.: (914) 761-0300
Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 4

Attorney/Firm Name: Oxman Tulis KirkPatrick Whyatt & Geiger, LLP
Address: 120 Bloomingdale Road
City: White Plains State: NY Zip: 10605 Telephone No.: (914) 422-3900
Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 5 6

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in §670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention (Form A this document); (2) any required Additional Appeal Information Forms (Form B); (3) any required Additional Party and Attorney Information Forms (Form C); (4) the notice of appeal or order granting leave to appeal; (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken; and (6) a copy of the decision or decisions of the court of original instance, if any.

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2

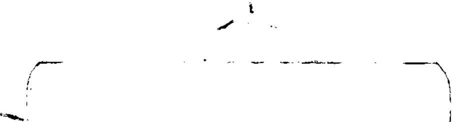


Exhibit 2

2

Exhibit 2

Final 6/3/09

FINDINGS STATEMENT
SEVEN SPRINGS SUBDIVISION AND EQUESTRIAN FACILITY
TOWN OF BEDFORD, NEW YORK

I. INTRODUCTION

This document is a Findings Statement prepared pursuant to and as required by Part 617.11 of NYCRR Part 617, Title 6 (the Statewide regulations implementing the New York State Environmental Quality Review Act). This Findings Statement pertains to the environmental review of the proposed Seven Springs Subdivision. This Findings Statement draws upon the facts and conclusions in the Draft Environmental Impact Statement (DEIS) accepted by the Lead Agency on June 10, 2008 and the Final Environmental Impact Statement (FEIS) accepted by the Lead Agency on March 27, 2009.

This Findings Statement attests to the fact that the Town of Bedford Planning Board, acting as Lead Agency in the environmental review of this matter, has complied with all of the applicable procedural requirements of Part 617 in reviewing this matter, including but not limited to the following:

- Circulation of Notice of Intent to be Co-Lead Agency for the two-town subdivision plan by the Planning Boards of the Towns of Bedford and North Castle on May 14, 2004;

- Designation of the Town of Bedford Planning Board and the Town of North Castle Planning Board as the Co-Lead Agency on June 14, 2004;

- Issuance of a Positive Declaration on June 14, 2004 by the Co-Lead Agency and direction to prepare a Draft Environmental Impact Statement ("DEIS");

- Holding of a public Scoping Session for the DEIS by the Co-Lead Agency on June 29, 2004;

- Preparation of a DEIS by the Applicant;

- Review by the Co-Lead Agency of multiple drafts of the proposed DEIS with respect to completeness;

- Withdrawal by the applicant of all applications to the Town of North Castle on August 10, 2007;

- Circulation of Notice of Intent to be sole Lead Agency for the proposed Bedford only subdivision plan by the Town of Bedford Planning Board on October 30, 2007;

- Acceptance of the DEIS for the Bedford only plan by the Lead Agency and the filing of the DEIS and Notice of Completion on June 10, 2008;

- Holding of a Public Hearing on the DEIS by the Lead Agency on July 29, 2008;

- Closing of the Public Hearing on the DEIS on July 29, 2008 and the establishment of a public comment period on the DEIS for submission of additional written comments ending on August 29, 2008:

  Preparation of a FEIS by the applicant;

- Review by the Lead Agency of two drafts of the proposed FEIS with respect to completeness;

- Acceptance of the Final Environmental Impact Statement ("FEIS") by the Lead Agency and the filing of the FEIS and Notice of Completion on March 27, 2009 and the establishment of a public comment period on the FEIS for the submission written comments ending on April 30, 2009;

- Review and consideration of comments submitted by Involved Agencies, Interested Agencies and members of the public in writing and at public meetings throughout the course of the environmental review process; and

- Preparation and adoption of this Findings Statement by the Lead Agency.

This Findings Statement also attests to the fact that the Lead Agency has given due consideration to the Environmental Impact Statement (EIS) prepared in conjunction with this action and the public comments submitted on the same. Furthermore, this Findings Statement contains the facts and conclusions in the EIS that were relied upon by the Lead Agency to support its decisions and indicates the social, economic and other factors and standards that form the basis for its decisions.

A. Site Description

The site of the proposed Seven Springs Residential Subdivision and Equestrian Facility is the 80.5-acre Bedford portion of the 213-acre former Eugene and Agnes Meyer estate located in northern Westchester County at the intersection of the Towns of Bedford, North Castle and New Castle. This part of the estate is generally bordered on the north by approximately 920 feet of frontage on Oregon Road (in the Town of Bedford); on the east by approximately 1400 feet of Byram Lake watershed lands owned by the Village of Mount Kisco; on the south by the town boundary between the Towns of Bedford and North Castle; on the west by a single-family residence on a 10 acre parcel.

The area surrounding the site to the north, west and south is composed principally of nature preserves, parkland and low-density residential development. In addition to the 247-acre Eugene and Agnes Meyer Nature Preserve located to the south and southwest of the site, other major open space parcels in the vicinity include the 358-acre Arthur W. Butler Memorial Sanctuary, the 100-acre Marsh Sanctuary and the 100-acre Merestead estate that is now Westchester County parkland. The closest residential areas to the west include a 10-acre parcel that is surrounded by the site on three sides and is developed with a single-family residence and several accessory buildings as well as four other single-family residences located along or near Oregon Road in the Town of Bedford. To the west, existing single-family residential development exists along Sarles Street and Bretton Ridge Road in the Town of New Castle. Since the Eugene and Agnes Meyer Nature Preserve abuts the site to the south and southwest, the nearest residential development in the Town of North Castle is located further to the southwest along Sarles Street and approximately 800 feet to the south of the site on Oregon Hollow and Oregon Road.

The 80.5 acre Bedford portion of the site is located in the R-4A District, a zoning designation permitting single-family residential development on a minimum lot size of four acres. The 97.8-acre North Castle portion of the site is located within an R-4A District. The 31.5 acre New Castle portion of the site are located within an R-2A District, permitting single-family residential development on a minimum lot size of two acres.

The Bedford portion of the site is predominantly open fields and moderate terrain. The site contains areas of landscaped estate grounds, open meadows, an open wetland, an old orchard and many stonewalls. The high point of the site is at elevation 758 (feet above sea level) and is located on a knoll near the North Castle border at an existing stone water tower. The low point of the site is at approximately elevation 525 and is located at the southeasterly corner of the property adjacent to Byram Lake. Approximately 82 percent of the site contains slopes of 0-15 percent; another 10 percent of the site contains slopes of 15-25 percent; and the remaining 8 percent of the site contains slopes of 25 percent or steeper.

Two separate Town-regulated wetland areas on the site total approximately 0.43 acres. Approximately 37 percent of the greater, three-town site drains to the Kisco River and is therefore within the New York City Croton Watershed. Another 56 percent of the site drains to Byram Lake and is therefore within the watershed of the Village of Mount Kisco's water supply reservoir (which has been designated as a Critical Environmental Area (CEA) by the Town of Bedford and Westchester County). The remaining 7 percent of the site drains to the Wampus River and eventually to Long Island Sound.

The existing structures on the Bedford portion of the site include a farmhouse constructed prior to 1851, a caretaker's house, a large barn complex, carriage barn, greenhouse and garden buildings, a stone water tower, root cellar, and Nonesuch, a Tudor style stone residence with a courtyard and a tennis court.

B. Project History

The Applicant first submitted applications for approval to the Towns of Bedford, North Castle and New Castle in June 1996 for the development of the site as a private membership club which was to include an 18-hole golf course with pro shop, putting green, practice range, short game practice area and maintenance building; a clubhouse in the former Seven Springs estate house with dining facilities, lounge areas, locker rooms and overnight suites accommodating up to 12 club members; a separate guest house in the existing Nonesuch estate house with overnight suites accommodating up to 12 club members, a swimming pool and a tennis court; parking areas and appurtenant facilities; and the construction of nine single-family residences.

The Applicant proposed to sponsor professional golf tournaments at the site, which would have been open to the public. Part of the golf club, including the clubhouse and the maintenance area, and two single-family residences were to be located in the Town of North Castle. Part of the golf club, all of the Nonesuch facilities and one single-family residence were to be located in the Town of Bedford. Six single-family residences were to be located in the Town of New Castle. Primary access to the golf club was to be provided from the existing site driveway on Oregon Road. Access to the residential development in New Castle and North Castle was to be provided from a new subdivision road intersecting with Sarles Street in the Town of New Castle. Although that proposal also involved a connection of the proposed subdivision road to Oregon Road in the Town of Bedford, through traffic between Sarles Street in New Castle and Oregon Road in Bedford would not have been possible since the installation of gates and gatehouses at either end of the new subdivision road was proposed. The Draft Environmental Impact Statement prepared for this golf course project and accepted by the then Co-Lead Agency, consisting of the Bedford Zoning Board of Appeals, New Castle Planning Board and North Castle Town Board, in August 1998 was based upon the original development concept proposed by the Applicant ("the DEIS Site Plan").

Following the close of the public hearing on the DEIS and the expiration of the public comment period in November 1998, the Applicant was directed to prepare a Final Environmental Impact Statement (FEIS) for consideration by the Co-Lead Agency. Prior to submission of the first draft of the FEIS, the Applicant notified the Co-Lead Agency that it had modified the proposed development concept for the project in response to comments by the reviewing agencies and the public, and in order to avoid or further mitigate potential impacts of the proposal on the site and the community. The Applicant further advised the Co-Lead Agency that it would describe those project modifications in the FEIS.

The principal modification to the original golf course plan proposed by the Applicant was the elimination of the eight single-family residences in the Towns of New Castle and North Castle and the elimination of the new subdivision road intersecting with Sarles Street. The Applicant also stated that it planned to convey all of the New Castle land to The Nature Conservancy or another similar conservation organization, subject to a restrictive declaration intended to protect that land in its natural state in perpetuity. Other significant modifications proposed by the Applicant included elimination of all professional tournaments and events involving paid admission, spectator gallery; separate short game area; revision of Golf Holes #10, #11, #12 and #15, redesign of the Nonesuch area in the Town of Bedford, including provision of a separate driveway access to Oregon Road in the Town of Bedford; addition of restrictions on the use of the driveway from Oregon Road in the Town of Bedford to the maintenance area; and the provision of an additional emergency access connection to the site from the existing driveway behind Nonesuch. The Final Environmental Impact Statement prepared for this project and accepted by the Co-Lead Agency in November 2000 was based upon the modified plan proposed by the Applicant ("the FEIS Site Plan").

Based upon the modified golf course plan, the Applicant formally withdrew its applications for a subdivision plat, wetlands permit, steep slope permit and tree removal permit in the Town of New Castle. Subsequently, the Town of New Castle also withdrew as a member of the Co-Lead Agency subject to the stipulation, among other conditions, that gave the Town of New Castle the right to rejoin the Co-Lead Agency as a fully participating member in the event that the Applicant further modified the proposed development concept during the course of the SEQRA review by the Co-Lead Agency so as to require a regulatory permit or approval from the Town of New Castle.

A Findings Statement prepared in accordance with SEQR regulations was adopted by the Co-Lead Agency for the modified plan on April 25, 2002. The Bedford Planning Board was not part of the Co-Lead Agency and did not approve a Findings Statement for the golf course.

In March 2004 a different development plan for the property was submitted to the Towns

of Bedford and North Castle. This plan consisted of a single-family residential subdivision containing 8 single-family lots in Bedford and 9 single-family lots in North Castle. The North Castle portion of this plan was withdrawn in August 2007.

II. PROPOSED ACTION

A. Project Description

The Proposed Action is a residential subdivision of the Bedford portion of the Seven Springs site into nine lots: seven lots for new single-family residences ranging in size from 6.65 to 11.26 acres, one lot for the existing "Nonesuch" home (8.31 acres) and one lot for a private equestrian facility with staff housing (9.03 acres). The existing large barn complex will be renovated and re-used as the equestrian facility. The white farmhouse will also be preserved and renovated for use as a homeowner's association common facility. The carriage barn will be replaced with a staff housing facility incorporating four studio apartments with a central kitchen designed to occupy the same general footprint as the existing building and to be in character with the existing farm structures.

Access to Lots B1 and B2, the existing Nonesuch lot, will be over Oregon Road, an existing public road. Access to all other lots is proposed over a new private road intersecting Oregon Road (north), an existing public road in the Town of Bedford. The Meyer estate house will remain on the existing 103.8-acre lot in the Town of North Castle with access over its existing driveway from the proposed new private road in Bedford.

The proposed new private road is designed to conform to all Bedford town road standards except pavement width and length. Waivers for both pavement width and road length will be requested from the Planning Board. Under the Town of Bedford Subdivision Regulations, a dead-end road cannot serve more than fifteen homes, however the Planning Board may waive this requirement. Nine existing homes on Oregon Road, two existing homes on the property (Nonesuch and the Meyer estate) and seven new homes would be served by the new private road. No access to the North Castle portion of the site is proposed.

The 28.7-acre portion of the site in the Town of New Castle is not currently proposed to be developed. However, to ensure that potential future cumulative impacts are addressed, a hypothetical 5-lot subdivision of that portion was analyzed in the DEIS. Similarly, although no new development is currently proposed in North Castle, potential future cumulative impacts of a hypothetical subdivision are analyzed in the DEIS.

A homeowner's association (HOA) will be formed, subject to the approval of the New York Attorney General's office. All lots including the Meyer estate lot will be members

of the HOA, be subject to its rules and regulations and will own fee title to their individual lot plus an interest in common with all other lot owners in all HOA property. The private road will be maintained by a company owned by Donald Trump or its assignees. This company will have the obligation to maintain the on-site detention basin located on lot #B4 and will also be responsible to implement and enforce the Residential Lawn Management Plan (RLMP).

The equestrian facility will be owned and operated by a company owned by Donald Trump. The company will enter into a continuing contract with the homeowners, through the homeowner's association, which will set forth the obligations and benefits of all parties. The company will perform all functions necessary to board the horses and to maintain the facility.

The applicant has agreed that there will be no further subdivision of the Bedford portion of the site into additional building lots. This restriction will be indicated on the subdivision plat and by separate recorded agreement.

Water supply to the proposed lots will be provided by private, individual wells. Sewage from all lots will be treated in conventional subsurface sewage disposal systems. Both water supply and sewage disposal systems will be approved by the Westchester County Department of Health.

B. Required Approvals

The Proposed Action requires the following approvals:

1. **Town of Bedford Zoning Board of Appeals**
   Variance approvals for lot coverage for Lot B2 and for equestrian facility and staff housing on Lot B4 pursuant to Chapter 125 (Zoning).

2. **Town of Bedford Planning Board**
   Special Permit approval for equestrian facility and staff housing pursuant to Chapter 125 (Zoning) of the Bedford Town Code.
   Subdivision approval pursuant to Chapter 107 (Subdivision of Land) of the Bedford Town Code, including waiver for road pavement width and road length.
   Steep Slope Permit approval pursuant to Chapter 102 (Steep Slopes) of the Bedford Town Code.
   Tree Removal Permit approval pursuant to Chapter 112 (Tree Preservation) of the Bedford Town Code.
   Review and approval of Stormwater Pollution Prevention Plan pursuant to Chapter 103 (Stormwater Management) of the Bedford Town Code.

3. **Town of Bedford Historic Building Preservation Commission**
   Demolition permit for carriage barn.

4. **Town of Bedford Wetlands Control Commission**
Wetlands Permit approval pursuant to Chapter 122 (Wetlands) of the Bedford Town Code if a regulated act is proposed.

5. **New York City Department of Environmental Protection (NYCDEP)**
Approval of Stormwater Pollution Prevention Plan (SWPPP) for stormwater discharges within New York City Croton Watershed areas of the site.

6. **Westchester County Department of Health (WCDOH)**
Subsurface sewage treatment system (SSTS) approvals for maintenance area and the one single-family residence.
Water supply (well) approvals.
Approval of Realty Subdivision.

7. **Westchester County Planning Department**
Advisory review.

8. **Westchester County Soil/Water Conservation District**
Advisory review.

9. **New York State Department of Environmental Conservation (NYSDEC)**
Approval of General State Pollution Discharge Elimination System (SPDES) Permit and Stormwater Pollution Prevention Plan (SWPPP) for stormwater discharges.

10. **NYS Office of Parks, Recreation and Historic Preservation (NYSSOPRHP)**
Cultural resources review.

III. ENVIRONMENTAL IMPACTS OF PROPOSED ACTION

A. Geology and Soils

1. Impacts and Proposed Mitigation

The 80.5-acre Bedford portion of the site contains nine different soils types, including Charlton-Chatfield, Chatfield-Hollis Paxton and Woodbridge soils. The site's surface features are predominantly flatter terrain previously used for farming or residential lawn. Soil limitations on the development of this property pertain mostly to slopes and a few areas of shallow depth to bedrock.

According to the test boring reports, the subsurface soils encountered on the site are suitable for the proposed development. Rock may be encountered at some of the cut locations may need to be removed. In areas where fill is required, it can be placed after stripping the topsoil and rolling the subgrade. The silty sand, gravelly

silty sand, decomposed rock and the excavated rock can be used as new fill for both building areas and the general site work.

With excavation for ponds and utility lines and the construction of access drives and foundations, some blasting was originally anticipated to occur on the site. Based on comments received from the public on the DEIS, the Planning Board discussed this topic at several public Planning Board meetings. As a result of this discussion, the applicant has engaged the services of an additional civil engineer to evaluate this subject. Based on this review, the applicant has stated that no blasting is anticipated to construct the proposed project (FEIS, p. 43). With respect to blasting near the easterly side of the property near Byram Lake, the applicant has stated conclusively that no blasting will occur "at the crest of the slope overlooking Byram Lake" (FEIS, p. 34). The Planning Board has determined that no blasting will be permitted on this property under this approval process. Any blasting proposed by the applicant at a later time will require a new application to the Planning Board with required review under the Town of Bedford Blasting Law, the New York State Environmental Quality Review Act and all other applicable regulations.

Portions of virtually all of the identified soil types on the site, with the exception of Sun Loam (Sm), Hollis Rock outcrop complex (Hrf) and Chatfield-Hollis rock out outcrop complex (Ctc), will be affected to some degree by the construction of the proposed residential subdivision. Existing soils will be graded and shaped to achieve the proposed road, house sites, septic fields and stormwater detention areas.

Based upon the Subdivision Plan, it is estimated that approximately 33.6 acres of the 80.5-acre site would be temporarily disturbed, approximately 42 percent of the site. Of this area, the construction of the proposed infrastructure would impact 1.23 acres of slopes greater than 25%. The proposed home design plan would impact 2.03 acres of slopes 25% or greater. A Steep Slopes Permit from the Planning Board will be required for these areas. Based on the preliminary grading plan submitted by the applicant, the necessary earthwork will be balanced (FEIS, p. 8).

Where slopes are proposed to be disturbed, proactive stabilization methods, both temporary and permanent, will be used as a part of a comprehensive soil erosion and sedimentation control plan. Unless prior written approval is obtained from the Town, the amount of soil disturbance at any one time will be limited to no more than five acres in accordance with SPDES General Permit GP-0-08-001.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will not require blasting for its construction.

- Disturbance of existing soils will be required for construction of the subdivision road and buildings. The amount of disturbance proposed for the proposed subdivision is typical for this type of project.

- Prior to the signing of the Final Plat the applicant will be required to submit final plans for soil erosion and sediment control for review and approval.

- The Proposed Action will adequately avoid or mitigate potential impacts on geology and soils.

B. Topography and Slopes

1. Impacts and Proposed Mitigation

Potential impacts to slopes and topography, such as sedimentation and soil erosion, could occur during construction of the proposed development as soils are cut and filled to install the private road, drainage facilities and home sites.

Based upon the Subdivision Plan, it was estimated that approximately 33.6 acres of the 80.5-acre site would be temporarily disturbed, approximately 42 percent of the site. Of this area, the construction of the proposed infrastructure would impact 1.23 acres of slopes greater than 25%. The proposed home design plan would impact 2.03 acres of slopes 25% or greater. A Steep Slopes Permit from the Planning Board will be required for these areas. Based on the preliminary grading plan submitted by the applicant, the necessary earthwork will be balanced (FEIS, p. 8).

A comprehensive Soil Erosion and Sedimentation Control Plan will be implemented prior to the commencement of any grubbing, grading or construction on the site. This plan will remain in place and will be monitored and maintained for the duration of the construction process.

Much of the concern expressed at the numerous meetings held by the Planning Board on this proposal have been over potential impacts to the slope above Byram Lake, most of which is not located on the applicant's property.

The proposed Subdivision Plan indicates no construction on the steep slopes adjacent to Byram Lake. There will no blasting anywhere on the property. The nearest construction of any type would be the creation of a raised berm to intercept surface drainage which, at all points, is located at least 550 feet from the edge of

Byram Lake and is at least 150 feet from any slopes over 25% leading to Byram Lake, both distances measured horizontally.

The proposed residential subdivision and equestrian facility will change the nature of vegetative cover on various areas of the site. The runoff coefficients for the different areas have been carefully studied to determine that the proposed development will result in no significant change in the peak rate of runoff to Byram Lake. The runoff coefficient for the drainage area above the slope will not be significantly different from that which currently exists at that part of the site, thereby resulting in no significant change in the peak rate of runoff in those areas. Therefore, the modification of cover type will not influence the conditions of the slope.

As part of the overall Stormwater Management Plan for the proposed development, water will be diverted away from the eastern slope of the site so that the total volume of runoff that reaches Byram Lake via that slope will be less under post-development conditions than under pre-development conditions. However, the total volume of water reaching Byram Lake from all sources will remain unchanged. Where runoff is collected to a central point or discharged to a concentrated point, a level spreader or other device will be used to distribute the water from the detention pond across portions of the slope. This will reduce potential impacts to the slope.

2. Discussion and Findings

The Lead Agency finds that:

- Prior to the approval of the Preliminary Subdivision Plat, the Applicant will be required to submit for review and approval by the Planning Board of final plans concerning soil erosion and sediment control as well as a final stormwater drainage plan for the site.
- The Proposed Action will adequately avoid or mitigate potential impacts on topography and slopes.

C. Ground Water Resources

1. Impacts and Proposed Mitigation

Extensive hydrogeologic investigations have been conducted to evaluate the potential impacts to ground water quality and quantity, and to determine the extent of hydraulic connection between the site and Byram Lake. The hydrogeologic investigations included:

- Field geologic mapping;
- Fracture trace analyses;

- Well drilling and geologic logging;
- Geophysical surveying;
- Aquifer testing of four individual wells.
- Aquifer testing of four wells simultaneously;
- Ground water level monitoring on-site and off-site;
- Safe yield analyses; and
- Pesticide fate modeling.

The results of the hydrogeologic investigations, as presented in the DEIS, show conclusively that the bedrock aquifer underlying the Seven Springs property is hydraulically isolated from Byram Lake.

Analyses of fracture traces, geologic reconnaissance and geophysical surveying indicate that bedrock structure and fractures at the site run northeast to southwest. Groundwater elevations in monitoring wells adjacent to Byram Lake are over 200 feet above the lake level. Because the lake lies to the east of the site and because of the large difference between on-site groundwater elevations and lake levels, there is little evidence of a hydraulic connection between the fractured bedrock aquifer on the site and Byram Lake to the east.

A series of hydrogeologic investigations was conducted for the previously proposed golf course project to assess existing groundwater resources, to determine their ability to meet irrigation demands and to assess the potential effects of the project on neighboring wells. These investigations included drilling eight on-site test wells, individual and system pumping tests in four of the wells, geophysical surveying of the property to assess subsurface fracturing and evaluating the natural groundwater recharge that occurs on the site.

At the pumping rate of 160 gallons per minute (gpm) for the previously proposed golf course, no drawdown was observed in any of the neighboring wells monitored and there were no observed drawdown effects on Byram Lake. The irrigation, domestic and horse facility demands for the proposed subdivision and equestrian facility during the month of July, the worst case usage month, is approximately 19 gpm. Therefore, the combined pumping rate for the proposed residential subdivision and equestrian facility is substantially less than the originally proposed golf course.

The anticipated demand of the residential and equestrian proposal would utilize only 11 percent of the available annual recharge on the site. The peak water demand usage will occur in July when irrigation water demand is at its highest. Additionally, approximately 80 percent of the groundwater withdrawn for potable use will be recharged back to the aquifer through the use of on-site septic systems.

A Residential Lawn Management Plan (RLMP) was prepared for the project that outlines a site-specific program for the management of lawns through the controlled use of nutrient and pesticide applications (DEIS Appendix E). Further, 7.61 acres of the Bedford portion of the site will be permanently protected by conservation areas restricted by negative covenants and will remain undisturbed. Along with prescribed application schedules and procedures outlined in the RMLP, this open space will significantly reduce the potential for groundwater contamination. The final form of the RLMP is subject to the approval of the Planning Board.

A company owned by Donald Trump or its assignees will administer and enforce the RLMP, however, the declaration of covenants and restrictions will also grant the Town of Bedford the right to enforce the RLMP regulations. An annual report of the work performed in accordance with the RLMP will be filed each year with the Town. The Planning Board will require periodic testing of surface waters leaving the site as a part of the subdivision approval process. Violations of the approved RLMP may be cited by the Town enforcement officer and corrective action required.

2. Discussion and Findings

The Lead Agency finds that:

- The Applicant performed extensive water resources analyses of this site and the neighboring properties. These investigations, in conjunction with the Residential Lawn Maintenance Program (RLMP) developed for the project, were completed to determine the impacts of all facets of the proposed project on the Seven Springs site and surrounding areas and their suitability for the site. Results from the various analyses and predictive models used by the Applicant indicate that the proposed project will not adversely affect the ground water resource features on and around the Seven Springs property. The maintenance program specified in the RLMP will be continued indefinitely. Annual reports as specified in the RLMP will be submitted to the Town.

- The results of the groundwater risk assessment concluded that there are no predicted risks to the groundwater resources on or off the site. Therefore, there are no expected impacts due to groundwater discharges from the site to surface waters entering Byram Lake or the New Croton Reservoir. The Applicant's plan will not adversely impact ground water quality and/or quantity.

- As a condition of any subdivision approval, the Applicant will be required to permanently implement the proposed Residential Lawn Maintenance Program for the site.

- The Proposed Action will adequately avoid or mitigate potential impacts on ground water resources.

D. Surface Water Resources/Stormwater Drainage

1. Impacts and Proposed Mitigation

Surface water resources on the Bedford portion of the Seven Springs site consist mainly of surface and overland runoff in association with seasonal seeps and watercourses. One perennial watercourse, located in the southwesterly corner of the site, crosses a small portion of the site. An intermittent swale runs north to the property's border with Oregon Road through a small wetland. The property serves as the headwaters for three different drainage basins: the Byram Lake Reservoir watershed, the Kisco River watershed and the Wampus River watershed.

Byram Lake located just east of the site and is classified as a Class AA water body by NYSDEC. It serves as the drinking water supply for the Village of Mount Kisco and small areas in the Towns of Bedford and New Castle. Byram Lake is the headwaters for the Byram River, which ultimately discharges into the Long Island Sound. Approximately 118 acres of the total three-town site drain to Byram Lake. Approximately 80 acres of the site lie within the Kisco River Basin, which is part of the New York City Watershed. Approximately 15 acres of the site drains to the Wampus River and eventually to Long Island Sound.

The groundwater quality risk assessment conducted for the proposed development concluded that there are no predicted risks to the groundwater resources on or off the site. Therefore, it is concluded that there are no expected impacts due to groundwater discharges from the site to downstream surface waters.

Based on the proposed Subdivision Plan, impervious surface on the site will increase by approximately 4.5 acres. This figure includes potential tennis courts and swimming pools on each lot and is therefore conservative. Wooded areas will decrease by approximately 7 acres with most of these areas to be redesigned as landscaped and meadow areas as well as stormwater management facilities. The increases in the rate of stormwater runoff and associated potential adverse impacts will be managed and reclaimed (or eliminated entirely) through the implementation of a stormwater management plan. The stormwater plan includes a proposed stormwater basin on Lot B4.

The storm water plan has been designed to control post-development runoff through the entire range of storm events (1 year- through 100 year storms) based on Soil Conservation Service (SCS) methodology to avoid increased stream channel erosion, maintain the adequate of the existing drainage system, manage the increased runoff volume, minimize sedimentation into receiving waters and

not increase flooding of downstream properties. This plan will be approved by the Town of Bedford and the NYSDEP and will meet the requirements of the Town Stormwater Regulations and NYSDEC SPDES General Permit GP-0-08-001. Based on this plan, there will be no impact on receiving waters such as Byram Lake, the New Croton Reservoir and its tributary watercourses, wetlands streams and ponds.

Storm water runoff from the site flows to several environmentally sensitive water resource features that are on or adjacent to the site. These features include Byram Lake, surface watercourses, and on and off-site wetlands. Because of the existence of these water resource features, special attention has been devoted to managing the use of pesticides on the site through the development of a detailed Residential Lawn Maintenance Program (RLMP).

A surface water risk assessment was completed to provide a quantitative pesticide fate risk screening for the pesticides identified in the RLMP for use in the residential and equestrian development. Based on the results of that analysis, both management and engineering controls can be optimized and incorporated into the plan to effectively minimize or eliminate potential impacts to the water resource features on or adjacent to the property. The Planning Board will require periodic testing of surface waters leaving the site as a part of the subdivision approval process. In this manner, any measurable increase in pesticide loading from the site will be avoided.

During the construction period, a Soil Erosion and Sediment Control Plan specifically designed for the project will use temporary devices to control erosion and sedimentation.

2. Discussion and Findings

The Lead Agency finds that:

- The RLMP prepared for the proposed development outlines the anticipated dates and application rates of pesticide active ingredients to be used.
- Although surface water will be slightly redirected on the site, the basic drainage patterns of the site will be preserved. No surface water will be diverted from Byram Lake.
- Results from the various analyses and predictive models used by the Applicant indicate that the proposed project would not adversely affect the surface water resource features on and around the site.

- Steeply sloped portions of the site will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance.

  The erosion and sedimentation control plan and stormwater pollution prevention plan for the site will meet NYSDEC requirements and will be approved by the Town Engineer.

- The Applicant's plan will not adversely impact surface water quality or quantity. In addition, the Residential Lawn Management Plan established for the site will be sufficient to identify any surface water contamination..

- The Proposed Action will adequately avoid or mitigate potential impacts on surface water resources and stormwater conditions.

E. Wetlands

1. Impacts and Proposed Mitigation

The Bedford portion of the Seven Springs site currently contains approximately 0.43 acres of wetlands in two separate areas. These wetland areas are regulated by the Town of Bedford Freshwater Wetlands Law (Town Code Section 122) and also regulated by the United States Army Corps of Engineers (ACOE) in accordance with Section 404 of the Federal Clean Water Act (NYSDEC) in accordance with Article 24 of the New York State Environmental Conservation Law. The Bedford Wetlands Control Commission confirmed the wetlands delineations (DEIS IIID-2).

In addition, the site currently contains approximately 3.48 acres of 100-foot wetland/watercourse buffers regulated by the Bedford Wetlands Law. No areas of wetland buffer from wetlands in the Towns of New Castle or North Castle are present on the Bedford portion of the site.

Under the proposed Subdivision Plan, no disturbance to any wetland or wetland/watercourse buffer is proposed. To eliminate any potential disturbance, a defined limit of disturbance outside any regulated wetland or wetland/watercourse buffer will be established for each lot. The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board.

Strormwater runoff from the proposed development will not be discharged directly into wetlands and watercourses but will be retained, renovated and slowly released into the drainage system, thereby maintaining high water quality discharges from the property.

In response to the concerns regarding the adverse impacts from stormwater pollutants to the wetlands and watercourses during and after construction, the Applicant has prepared an Erosion and Sediment Control Plan, a Stormwater Pollution Management Plan, and a Residential Lawn Maintenance Plan (RLMP) that minimize stormwater impacts to wetlands and watercourses to the greatest extent possible. The RLMP will be administered and enforced by a company owned by Donald Trump or its assignee. Enhanced water quality protection measures will include reduced pesticide and fertilizer use under the RLMP and Best Management Practices (BMPs) to control nutrient run-off.

2. Discussion and Findings

The Co-Lead Agency finds that:

- The plan for the subdivision and equestrian facility proposes no disturbance to the existing wetlands, watercourses or wetland/watercourse buffers.

- Stormwater runoff from the proposed development will not be discharged directly into wetlands and wetland buffers.

- A 1.97-acre area around Wetland H will be permanently protected as a conservation area restricted by negative covenants controlling its use and maintenance.

- The Proposed Action will adequately avoid or mitigate potential impacts on wetlands.

F. Vegetation

1. Impacts and Proposed Mitigation

The vegetation communities on the site are divided into three broad categories: terrestrial cultural, forested uplands and wetlands. The terrestrial cultural communities encompass the highly developed and modified areas of the property. The forested uplands communities consist of common forest types and include a mix of second growth native, planted, and ornamental plant species. Vegetation associations indicative of wetland and watercourses make up a small portion of the site. Plant material on the property was identified and no rare, threatened or endangered plant species were observed or identified by regulatory authorities.

The proposed plan will require the clearing and grading of approximately 33.6 acres containing woods, orchards, open fields, scrub-shrub growth and estate landscape. The limits of clearing are based on preliminary grading plans prepared

for the subdivision shown in the DEIS (Plan BD-1) and assume a typical house size and location anticipated for this site. It is estimated that 875 trees with diameters over 8 inches will be removed during construction; of these, 105 trees are greater than 24 inches in diameter.

The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board. Within the areas of disturbance, the applicant will save as many trees, especially specimen trees, as can be feasibly incorporated into the landscape for the homes, but final landscape design will be each homeowner's decision, and so tree removal is an unavoidable impact of the proposed action. Tree removal permits are required as a part of Town of Bedford approval. The proposed plan will leave 58 percent of the site in a natural habitat condition and much of the disturbed portion of the site will be ultimately re-established. Therefore, a significant portion of the long-term impacts that would otherwise occur from the removal of existing vegetation will be mitigated.

Long-term impacts to vegetation will be minimal or non-existent in portions of the site that will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance. In addition, the use and disturbance of the area east of the berm on Lots B3, B4 and B5 will be regulated. Areas proposed to be converted from natural vegetation to lawn areas have the potential for adverse impacts, but these will be minimized through the implementation of the RLMP.

2. Discussion and Findings

The Lead Agency finds that:

- The removal of existing vegetation, including mature trees, is an unfortunate but unavoidable impact associated with development.
- Long-term impacts to vegetation will be minimal or non-existent in portions of the site that will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance. In addition, the use and disturbance of the area east of the berm on Lots B3, B4 and B5 will be regulated. Areas proposed to be converted from natural vegetation to lawn areas have the potential for adverse impacts, but these will be minimized through the implementation of the RLMP. The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board. The Planning Board will review specific tree removal and

replacement as a part of the subdivision approval process. The Proposed Action will adequately avoid or mitigate potential impacts on vegetation.

G. Wildlife

1. Impacts and Proposed Mitigation

The site consists of a 80.5 acre parcel that contains a mixture of man-modified and natural ecosystems. Ecological communities currently on the site that provide wildlife habitat include wetlands (forested, scrub-shrub, emergent and meadow/old field), water bodies (streams and ponds), upland mixed hardwood forest, meadow/successional old fields and maintained lawn. Wildlife associated with the site is typical of those present on larger land parcels in Westchester County that display similar habitat characteristics. The NYSDEC Natural Heritage Program did not have any records of endangered or threatened species or critical habitats on the site.

Site investigations were conducted to identify the wildlife species present on, or with potential to utilize the property. The DEIS includes a list of natural and man-made habitats on the site as well as a matrix that documents each habitat type and its potential value to wildlife species that are potential inhabitants of the site. A specific study was conducted to determine if bog turtles were present on the site. No bog turtles, or other rare, threatened of endangered wildlife species were identified on the property. One Species of Concern, the Eastern Bluebird, was observed during the wildlife survey.

The proposed plan will result in temporary impacts to wildlife on the site. On a permanent basis, no significant habitat fragmentation or adverse impacts to rare, threatened or endangered species are anticipated. The plan does not include any permanent, impassable barriers to wildlife such as fencing in the conservation area, so a continuum of habitats will remain, allowing wildlife to pass through the site.

The proposed action includes the introduction of nesting boxes within and at the edge of open growth areas to provide additional habitat features for the Eastern Bluebird, as well as provide nesting sites for tree swallows.

Since the Indiana bat is assumed to occupy or use the site for foraging or roosting, the applicant proposes to limit forest-clearing activities to between October 1 and March 30, the bat's hibernation period, when they will not be present on the site. Consultation with the United States Fish and Wildlife Service concurred that this restriction would avoid direct impacts on the bat and also did not anticipate impacts on the bog turtle (DEIS, p. I-16)

Concerns were expressed during the SEQRA process regarding impacts that development of the site would have on wildlife species and wildlife habitats, impacts to the adjacent nature preserve and wildlife corridors, disturbance to wetland buffers, increasing Canada geese populations, and impacts to wildlife on neighboring residential properties.

In response to the concerns regarding wildlife and wildlife habitats, a limit of disturbance line has been designed to minimize impacts to vegetation and wildlife habitats to the greatest extent practicable. This limit is shown on the plan entitled "BD-1 Development Plan – Bedford," dated 3/31/05, prepared by TRC Engineers, Inc.

In response to the concerns regarding possible impacts to the nearby nature preserve and wildlife corridors, the plan will preserve 5.24 acres of wooded land adjacent to the Byram Lake in perpetuity. Larger animals, such as deer, will continue to utilize the preserved wooded areas as well as other parts of the site as travel corridors during dusk and dawn hours. No fences that could block the movement of small animals and amphibians across the landscape will be used.

In response to concerns regarding potential impacts of wildlife on neighboring residential properties, a measurable increase in wildlife use of neighboring properties is not anticipated to occur as a result of the implementation of the revised site plan. The majority of the animals that are displaced by activities associated with the proposed development will relocate to the undisturbed wooded portions of the site and the adjacent nature preserves. The larger animals, such as deer, will continue to frequent the property.

2. Discussion and Findings

The Lead Agency finds that:

- A limit of disturbance line has been designed to minimize impacts of vegetation and wildlife habitats on the site to the greatest extent practicable, and the proposed site plan has been designed so that no measurable impacts will occur to wildlife populations on adjacent properties.

- The proposed development will not impact Federal or State rare, endangered or threatened wildlife species or communities.

- The Proposed Action will adequately avoid or mitigate potential impacts on wildlife.

H. Traffic and Transportation

1. Impacts and Proposed Mitigation

Access to the proposed residential subdivision and equestrian facility will be from Oregon Road, a public street in the Town of Bedford. New Lot B1 and the Nonesuch lot (B2) will each have a new private driveway entering Oregon Road.

A proposed new private road intersecting with Oregon Road and following the route of the existing driveway, will serve the remaining six lots, the equestrian facility and the existing estate house in North Castle. This road will end within 75 feet of the southerly property line. The design of the turnaround will be determined by the Planning Board in consultation with the emergency service providers serving the site during the subdivision review process. A separate parcel of land approximately 0.17 acres in area will be dedicated to the Town of Bedford at the end of the private road. This layout is shown on the subdivision plan, included in the FEIS, entitled "Seven Springs – Preliminary Subdivision Plat (Bedford)," dated 7/3/08, prepared by Donnelly Land Surveying.

Chapter 107 of the Bedford Land Subdivision Regulations limits the length of a dead end road to that serving not more than 15 houses unless waived by the Planning Board. Oregon Road currently serves nine existing homes in addition to two existing homes on the Seven Springs site (Nonesuch and the Meyer estate house). With the proposed seven new homes, a total of 18 homes would use Oregon Road. Because the subdivision application in North Castle was withdrawn, no alternative entrance exists for the Proposed Action.

The applicant has agreed that the new road will not be extended or used for access to the North Castle portion of the site except for access to the existing estate home. If, in the future, the North Castle portion of the site is developed with a primary access from North Castle, the Bedford Planning Board may grant amended subdivision approval specifically permitting a connection to create a through road. Any other scenario would violate the Town of Bedford regulations for dead-end roads. This agreement will be a covenant in the recorded declaration of the homeowner's association that will be formed by the applicant.

A Traffic Impact Analysis was prepared for the prior proposed 17 lot subdivision by John Collins Engineers presented in the DEIS and updated in the FEIS and included 27 intersections. The analysis identified base traffic volumes, expanded base volumes to reflect background traffic conditions for a design year and combined traffic volumes, which included other developments, typical growth factors and estimates for site-generated traffic for the proposed use.

The proposed subdivision will generate up to 7 entering vehicles and 231 exiting vehicles during the weekday AM peak hour and 18 entering and 10 exiting vehicle during the weekday PM peak hour. The additional traffic generated by the

proposed project is not expected to significantly change traffic operations in the vicinity of the site and will not result in significant increase in levels of service, traffic conditions or deterioration in operating conditions. Accordingly, no traffic mitigation is proposed.

Proposed road pavement with for the new private road is 20 feet, within a 50 foot wide right-of-way. This road width is narrower than the standard width of 24 feet cited in the Town Subdivision Regulations. The narrower width will reduce environmental impacts including less tree removal, less impervious surface, less cut and fill and preservation of more of the existing stone wells on the site. No sidewalks or street lights are proposed on the new private road.

A detailed analysis was prepared by the Applicant to evaluate construction traffic and impacts on area roadways. It has been determined by the Applicant that all construction traffic will follow one specific access route. All trucks will access the area from N.Y. Route 117 and follow Byram Lake Road to access Oregon Road and the site driveway. Construction traffic will be directed not to use Sarles Street or Byram Lake Road around Byram Lake. The major stream crossing under Byram Lake Road was reinforced previously to accommodate construction traffic to the Village of Mount Kisco water treatment plant and, therefore, this road should be able to safely handle the construction traffic anticipated from this project.

The Applicant has agreed to prohibit heavy construction vehicles from using Byram Lake Road during its use by school buses. Flagmen will be posted at critical areas for safety of the public during any movement of trucks other than isolated single trucks.

The impact of construction traffic to trees along the construction route was discussed in the DEIS (IIIE-9,10) and trees over 24" dbh were mapped in Figure #E-5. The DEIS concludes that construction vehicles will not damage these trees (DEIS IIIE-26). The Applicant will be responsible for any damage to area roadways or trees caused by construction traffic. To protect the Towns affected, appropriate insurance, bonding or escrow funds will be established to cover these costs.

Discussion and Findings

The Lead Agency finds that:

- Site access is proposed via Oregon Road in the Town of Bedford. All vehicles will generally access Oregon Road and the site access drive via N.Y. Routes 22 and 172, Sarles Street, Byram Lake Road and other local roadways.

- Results of the traffic capacity analysis show that each intersection studied would continue to operate at the same Level of Service with or without site traffic.

- Construction traffic will be required to access the site from N.Y. Route 117 and travel south on Byram Lake Road to Oregon Road and enter the site via the main access drive. The Applicant will repair any damage that occurs to roads or trees due to construction vehicles as required by each municipality. Construction traffic will be limited and delivery times will be specifically directed to prohibit use of local roads during their use by school buses. Flagmen will be used to control truck traffic.

- There will be no use or landing of helicopters on the site as part of the proposed development, or at any time in the future, except for emergency medical purposes.

- The Proposed Action will adequately avoid or mitigate potential impacts on traffic.

I. Land Use and Zoning

1. Impacts and Proposed Mitigation

Land uses surrounding the site include mostly low-density single-family residential development and open space. Open space areas include the Eugene and Agnes Meyer Nature Preserve, Merestead County Park and Byram Lake.

The zoning of the site and surrounding lands in the towns of Bedford and North Castle is R-4A, permitting single-family development on lots of four acres or more. Zoning in the Town of New Castle is R-2A, permitting lots of two acres in size.

The primary land use impact resulting from the proposed development of the site will be a change from the present vacant residential estate to a residential development with an equestrian facility, staff housing facility and reused historic farm buildings. The proposed use is consistent with the recommendations of the Bedford Comprehensive Plan of 2003 and the Westchester County Plan – Patterns for Westchester.

The proposed density of the project is well below that permitted by existing zoning. All new homes will be built in accordance with all dimensional requirements of the Zoning Law, except for Lots B2 and B5 that will need variances from the maximum building coverage requirement. A variance will also be required for the staff housing use. The Bedford Zoning Law currently permits

the equestrian facilities as a Special Permit Use. The proposed facility must receive this permit from the Planning Board.

The proposed private road will require a waiver for the reduction in road pavement width from 24 feet to 20 feet and for the maximum permitted length of a dead end road. Chapter 107 of the Bedford Land Subdivision Regulations limits the length of a dead end road to that serving not more than 15 houses unless waived by the Planning Board. Oregon Road currently serves nine existing homes, in addition to two existing homes located on the Seven Springs property (Nonesuch and the Meyer estate home). With the proposed seven new homes, a total of 18 homes would use Oregon Road.

Overall, the impacts to zoning and land use will not be significant. The proposed density within the Town of Bedford will be one house per ten acres. The development is therefore compatible with the low-density residential and open space land use and zoning of the surrounding area, as well as local land use plans. Therefore, no mitigation measures are proposed with respect to land use and zoning. The proposed plan includes 7.61 acres of conservation area, almost ten percent of the site area.

2. Discussion and Findings

The Lead Agency finds that:

- The proposed residential subdivision and equestrian facility is consistent with applicable zoning and land use regulations of the Town of Bedford.
- The Proposed Action is compatible with the recommendation of the Comprehensive Plans for the Town of Bedford and Westchester County.
- The Proposed Action will adequately avoid or mitigate potential impacts relating to land use and zoning.

J. Community Facilities and Services

1. Impacts and Proposed Mitigation

The property is served by the Mount Kisco Fire District and Mount Kisco Lions Volunteer Ambulance Corps for fire and emergency medical services, respectively. Police services are provided by the Town of Bedford. In general, the Proposed Action will require an increase in community services compared to

the current demand by the existing site use. Throughout the environmental review of the proposed residential development and previous golf course development, the Lead Agency has received comments from representatives of the emergency service providers indicating that police, fire and ambulance services currently serving the site would have some difficulty providing adequate levels of service for the Proposed Action (DEIS Appendix P). However, all of these comments pre-date the elimination of the nine lots proposed in the Town of North Castle that reduced the scale of the project.

The Bedford Police Department expressed concern for the ability to serve the area due to increasing development in the area, rising department costs and the desirability of an alternate entrance to the site.

The Mount Kisco Fire Department expressed concern with the lack of water supply for firefighting and also would prefer a secondary access route to the site. The applicant has proposed to equip each home with an indoor sprinkler system fed by a storage tank. In addition, the proposed detention pond will have 310,000 gallons of water in its permanent pool that can be accessed from a dry hydrant.

No comments were received from the Mount Kisco Lions Volunteer Ambulance Corps.

A secondary access to the site is not available at this time. The HOA will own and operate standard snow removal equipment as well as chain saws and other tools necessary to clear blocked roadways. The equipment will be stored on site and will be available to the HOA staff for use in emergencies and serious weather conditions.

The new development is estimated to generate a minimum of $500,000 in tax revenue to all non-school taxing jurisdictions (DEIS III-I-9), and therefore provide revenue substantially in excess of any additionally needed service costs.

The Proposed Action includes no community-wide water or sewerage facilities. Sewage disposal will be provided by individual on-site septic systems for each residence. Water supply will be provided by an individual well for each residence. No future public water or sewer services are expected due to the great distances and costs involved in extending existing service lines.

Because the new road would be privately owned, no municipal snow plowing or road maintenance will be provided. Solid waste will be hauled away by private contractors.

The proposed homes and equestrian facility will incrementally increase demand for electricity, telephone and cable services at the site, although no significant impacts to these utilities are anticipated.

The Bedford portion of the site is currently located in the Bedford Central School District. Using standard analyses for determining population from residential development, the Proposed Action is estimated to increase enrollment in the Bedford Central School District by 12 students. This increase is minor and is expected to be accommodated by existing service levels and resources. The new tax revenues anticipated from the project are expected to provide $2,195,082 in tax revenue to the school district. This figure is significantly higher than the costs to educate the number of students generated by the development.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will not have a significant adverse impact on the police, fire or ambulance services. Tax revenues generated by the new development are expected to offset the incremental increase over time in the cost of providing these services.
- Subject to receiving necessary approval from other permitting authorities, the requirements for potable water and irrigation water for the proposed development will be met by wells. Therefore, existing public water supply systems will not be impacted by the Proposed Action.
- Subject to receiving necessary approvals from other permitting authorities, the Applicant will use on-site sewage disposal systems for the proposed development. Therefore, municipal sewerage facilities will not be impacted by the proposed development.
- The Proposed Action will adequately avoid or mitigate potential impacts on community facilities and services.

K. Historic, Archaeological and Cultural Resources

1. Impacts and Proposed Mitigation

Compared to the impacts associated with the originally proposed golf course plan, the cultural resources that are proposed to be disturbed under the residential subdivision and equestrian facility have been substantially decreased.

Representatives from the New York State Office of Parks, Recreation and Historic Preservation (NYSOPRHP) visited the site in May 2000 during the previous golf course application and determined that the former Seven Springs property meets the eligibility criteria for inclusion in the National Register of Historic Places. NYSOPRHP identified a number of structures and features throughout the site that contributed to this conclusion. In addition, NYSOHPRHP determined that the Nonesuch complex is also eligible for inclusion in the National Register of Historic Places.

Stage 1 archaeological testing was conducted over the entire site and revealed Native American and historic era sensitivity in eight loci. Stage 1A assessments were completed in 1998 (DEIS Appendix R). Stage 2 archaeological field investigations were completed in two areas in Bedford and the technical reports accepted by NYSOPRHP. These reports concluded that no further excavations were warranted in the side yard of Nonesuch (Area 6 Locus 1). However, Area 14 Locus 1, along the easterly side of the main driveway west of the secondary barn complex, was determined to have the potential to yield important prehistoric information. This area is eligible for listing in the New York State and National Registers of Historic Places (10/13/04 Correspondence from NYSOPRHP, DEIS Appendix S). Under applicable state and federal regulations, the applicant must either avoid or mitigate impacts to this area. The Proposed Action avoids these impacts by placing the area within a conservation area restricted by negative covenants.

The Proposed Action calls for the re-use of all but two of the existing structures on the site. Nonesuch and the Meyer estate house will continue to be used as single-family homes. Renovations to these historic structures will involve only minimal interior alteration. The exterior of the buildings will not be altered and the original exterior details will be refurbished to protect the architectural integrity of the structures.

The carriage barn and the modern tool shed will be removed. Demolition of the carriage house is under the jurisdiction of the Bedford Historic Building Preservation Commission and will require their approval.

Other buildings and features to be preserved include the Nonesuch gardens, stone garage, large caretaker's house, secondary barn complex and small caretakers house, the stone water tower, greenhouse and two root cellars. On the equestrian facility lot, the white farmhouse, caretaker's cottage and main barn complex will remain. The carriage barn is proposed for demolition and a new staff housing facility built in its place. The proposed new private road follows the route of the original estate driveway and will minimize disturbance to trees and stone walls. In addition, almost all of the stone walls on the site will relocated, repaired or rebuilt.

2. Discussion and Findings

- Most of the historically significant buildings on the site will be restored and preserved as a result of this project.
- Only one historic building, the carriage house, will be removed under the Proposed Action. The demolition of this building will require the approval of the Bedford Historic Building Preservation Commission.
- One area determined to have potential archeological significance, Area 14 Locus 1, will be permanently preserved within a easement.
- The Proposed Action will adequately avoid or mitigate potential impacts on historic, archaeological or cultural resources.

L. Visual Resources

1. Impacts and Proposed Mitigation

The Proposed Action will alter the visual character of the site from one characterized by an estate landscape of open fields, farm buildings and forested areas to one predominantly characterized by large, single-family residences on large lots. The farm structures around the white farmhouse will be retained and maintain the visual character of the majority of the property seen to the east of the main driveway.

The only structures that can be presently seen from outside of the site are Nonesuch house, visible from Oregon Road, and the Meyer estate mansion, the roof of which can be seen during winter months from I-684. Views of these structures are not anticipated to change significantly.

Views of the site from most of the surrounding area will not be impacted due to the topography and vegetation of the site. The conservation area on most of the perimeter of the site will assist in maintaining the densely wooded character seen from the east. Views of the eastern portion of the site from Route I-684 and nearby residences surrounding Byram Lake will be minimally changed by the Proposed Action, although the tops of homes on Lots 3, B4 and B5 may be seen. The portion of the site most visible from these locations is currently maintained as mowed lawn area surrounded by a wooded buffer that is proposed to remain. Similarly, the southern and southwestern portions of the site will maintain their existing views with wooded buffers proposed along the perimeter of the property.

Site frontage on Oregon Road will remain the same, except that the new residences on Lots B1 and B8 and the new driveway to Nonesuch will be seen. The nearest residential neighbors on Oregon Road will have views of new homes on Lots B1, B3, B7 and B8. However, these views will be screened by the

existing dense wooded buffers existing on the property. These buffers will be protected by the limits of disturbance shown on the proposed subdivision plan and discussed in Section E of this Findings Statement.

The addition of seven new homes on the site is not anticipated to significantly contribute to light pollution. No street lighting is proposed and all lots will comply with the lighting requirements of the Bedford Code. This regulation does not permit the exterior illumination of buildings and limits off-site light spillage to low levels.

2. Discussion and Findings

The Lead Agency finds that:

- When subdivision approval is sought, the Applicant will be required to specifically identify the trees to be protected during construction and to remain on site. Additionally, the establishment of clearing and grading limit lines will be required when determined necessary by the Town to preserve the visual and environmental resources of the site. When the plan is refined for approval purposes, emphasis should be placed on screening the site from the view of adjacent properties and streets and re-vegetating those areas disturbed during construction.
- The proposed single-family residences to be located on Lots B1, B3, B7 and B8 will be visible from adjacent residences and Oregon Road. This development is consistent with the current neighborhood character and existing zoning, and will not have an adverse environmental impact.
- The Proposed Action will adequately avoid or mitigate potential impacts on visual resources.

M. Noise

1. Impacts and Proposed Mitigation

The Applicant has conducted a detailed noise analysis and has modeled the anticipated noise levels associated with the proposed use (DEIS IIIL-1). The noise assessment included background noise monitoring at six selected noise sensitive receptors in order to characterize the existing noise environment.

No mitigation measures will be required for noise from the completed project since no noise impacts as expected.
Temporary noise impacts from construction activity are anticipated. Noise associated with construction activities will include, but not be limited to, noise from worker vehicles, construction equipment, delivery vehicles, construction activity such as clearing vegetation, grading, loading and unloading of trucks, and

building of structures. The short-tem nature and small, expected magnitude of the construction noise do not warrant any mitigation measures.

The applicant has stated that construction activities that will create noise in excess of the permitted decibel levels will be conducted during midday hours and will not take place during weekends or holidays. As a good construction practice to reduce construction noise to the greatest extent possible, and practical, functional mufflers will be maintained on all construction equipment. Construction activities on the site will comply with the noise requirements of Chapter 83 of the Bedford Code.

2. Discussion and Findings

The Lead Agency finds that:

- No negative noise impacts from the completed project are expected.
- Noise during construction will consist of noise from vehicular traffic, construction equipment, delivery vehicles, power tools, and construction activity. Noise levels associated with the construction activity will comply with all requirements of the Town noise ordinance. Construction activities that will create noise in excess of the permitted decibel levels will be conducted during midday hours and will not take place during weekends or holidays.
- There is no further practical mitigation that could eliminate or significantly reduce the noise associated with the Proposed Action. The Proposed Action will adequately avoid or mitigate potential impacts relating to noise.

N. Air Quality

1. Impacts and Proposed Mitigation

The air quality analysis conducted for the Proposed Action evaluated the potential ambient air quality impacts of the project against the applicable standards for those pollutants for which a National Ambient Air Quality Standard (NAAQS) exists. Currently, the United States Environmental Protection Agency USEPA) and the NYSDEC enforce ambient air quality standards for seven pollutants.

A review of existing air quality showed that of the seven pollutants, USEPA classified them all at attainment levels or better, except for particulate matter with a diameter less than 2.5 microns which has not been determined, lead which is not designated and ozone which has severe non-attainment.

With the Proposed Action, a minor increase in emissions is anticipated for the increase in vehicular traffic associated with the action, and for an increase in the

utilization of gasoline and diesel-powered maintenance equipment. Short-term impacts to air quality from the proposed development were associated with fugitive dust from the active construction areas and from emissions from construction equipment.

In accordance with the NYSDSDOT EPM (NYSDOT, 2001), emissions of inhalable particulate matter will be mitigated through the use of wetting of exposed soil. Covered trucks for soils and other dry materials, and controlled storage of spoils on the construction site. No impacts are anticipated due to heating and cooling systems emissions. It was also found that a refined air quality modeling analysis is not required for any of the studied intersections, and it can be concluded that it is highly unlikely that the project will violate the CO NAAQS.

No mitigation measures are proposed for the minimal increase in air pollutants from the completed project.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will adequately avoid or mitigate potential impacts on air quality.

O. Alternatives

The DEIS studied two alternative development plans for the Seven Springs site: 1) a conventional 17 lot single-family subdivision maximizing the use of the property with four acre lots, and 2) a cluster subdivision with 17 single-family lots ranging in size from 2.1 to 5.3 acres.

Table IV-2 in the DEIS compares and summarizes the impacts of the Proposed Action and the alternative plans in the following categories: geology and soils, topography and slopes, water resources, wetlands, vegetation, wildlife, traffic, land use and zoning, community facilities and services, utilities, cultural resources, visual resources, and air and noise.

As shown in the comparison table, both of the alternatives would have greater environmental impact on the site than the Proposed Action. The increased environmental impacts from the two alternative plans are due mainly to the increase in number of lots from 9 to 17. However, these alternatives would also require the removal of most of the existing buildings on the site, and therefore result in an important loss of cultural resources.

Comments on FEIS

The Lead agency has received correspondence from four parties regarding the FEIS. The comments of the Lead Agency on this correspondence follow.

1. Letter dated 4/28/09 from the New York City Department of Environmental Protection (NYCDEP). A Stormwater Pollution Prevention Plan (SWPPP) including an erosion control plan will be prepared by the applicant as a part of the preliminary subdivision review process. This plan must be reviewed and approved by NYCDEP. Wetlands delineations were confirmed by Bedford authorities (FEIS 16). The applicant has replied to the NYCDEP comments in a letter dated 5/5/09 and has provided a response dated 5/4/09 from his engineering consultant, Woodard & Curran, to these items.

2. Letter from Marc Viscusi dated 4/24/09. Issues of rock blasting and protection of the slopes over Byram Lake have been fully discussed in the FEIS (33-38). The applicant has responded to the Viscusi letter in a letter dated 5/5/09 and has provided a letter dated 5/4/09 from his engineering consultant, Woodard & Curran, also responding to the items in this letter. The Lead Agency has determined that the proposed plan will not have a negative impact on these slopes.

3. Letter from the Croton Watershed Clean Water Coalition dated 4/28/09. Issues regarding the export coefficients for phosphorous will be addressed in the SWPPP approved as a part of the preliminary subdivision. This plan must be approved by the NYSDEC, NYCDEP and the Town Engineer. The RLMP proposed by the applicant may be enforced by the Town of Bedford. In addition, testing of surface water flow will monitor the effectiveness of the RLMP.

4. Letter from the Town of New Castle dated 4/30/09. The issues of construction traffic routes and impacts are discussed in detail in the DEIS (IIIG-39-43). The Applicant will be responsible for any damage to area roadways or trees caused by construction traffic. To protect the Towns affected, appropriate insurance, bonding or escrow funds will be established to cover these costs.

General Findings

The Lead Agency finds that:

- The Lead Agency has given due consideration to the Draft and Final Environmental Impact Statements (EISs) as well as to comments received on the FEIS including 1) letter from the NYCDEP dated 4/28/09, 2) letter from Marc

Viscusi dated 4/24/09 and previous letters dated 7/23/08, 7/28/08, 8/6/08, 8/25/08, and 8/29/08, 3) letter from the Croton Watershed Clean Water Coalition dated 4/28/09 and 4) letter from the Town of New Castle dated 4/30/09 and has considered the written facts and conclusions contained herein.

- This Findings Statement has been prepared pursuant to and as required by 6 NYCRR Part 617.

- Consistent with social, economic and other essential considerations from among the reasonable alternatives available, the Proposed Action minimizes or avoids adverse environmental effects to the maximum extent practicable.

- Consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER)

SEVEN SPRINGS LLC	:	
Plaintiff(s)	:	**Index Number 21162/2009**
-against	:	**AFFIDAVIT OF SERVICE**
THE NATURE CONSERVANCY, ROBERT BURKE,TERI BURKE, NOEL B. DONOHOE, and JOANN DONOHOE	:	
Defendant(s)	x	

STATE OF NEW YORK)
) ss.:

I, Richard Schaab, being sworn, say: I am not a party to the action, am over the age of 18 years of age and reside in Sleepy Hollow, New York.

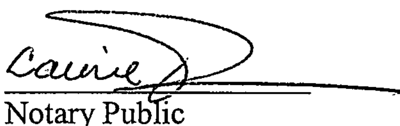
On February 19th, 2010 at 3:15pm I served the **Affirmation in Further Support of Motion to Dismiss Complaint, and Memorandum of Law in Further Support of Motion to Dismiss Complaint** papers upon DelBello, Donellan, Weingarten, Tartaglia, Wise & Wiederkehr, LLP, located at One North Lexington Avenue, White Plains, New York, 10601.

The documents were accepted by " Carolyn" a receptionist at the firm who was authorized to accept service on behalf of the firm. The person served can best be described as

Sex:	Female	Hair:	Brown
Skin:	White	Eyes:	Brown
Age:	45-50 approx. years of age	Height:	Approximately 5' 5"
Weight:	Approximately 130 pounds		

RICHARD SCHAAB

Sworn to before me this
22nd day of February 2010



Notary Public

LAURIE PAYER
Notary Public, State of New York
No. 4945402
Qualified in Dutchess County
Commission Expires Dec 19, 2010

340058.1

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

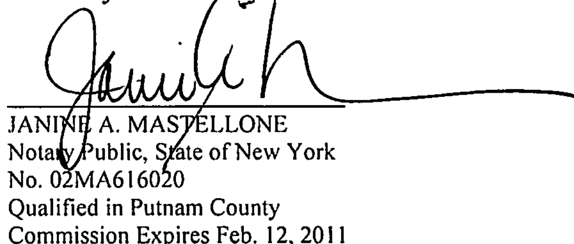
That on the 19th day of February, 2010, deponent served the within document(s) entitled Affirmation in Further Support of Motion to Dismiss the Complaint and in Opposition to Plaintiff's Cross-Motion for Leave to Amend upon:

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE Attention: John Kirkpatrick, Esq. 120 Bloomingdale Road White Plains, New York 10605 (914) 422-3900	Benowich Law, LLP Attorneys for Defendant THE NATURE CONSERVANCY Attention: Leonard Benowich, Esq. 1025 Westchester Avenue White Plains, New York 10604 (914) 946-2400

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a properly addressed Federal Express wrapper, in an official depository under the exclusive care and custody of Federal Express within the State of New York.

Krissie Taylor

Sworn to before me this
22nd day of February 2010



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Index No. 2116209

Charles M. Feuer, Esq.
08139.00589

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff(s),

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendant(s).

AFFIRMATION IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR LEAVE TO AMEND

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-- x Index No.: 21162/09

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

-- x

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE BURKE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of the Defendants, Robert Burke and Teri Burke (hereinafter, the "BURKE Defendants") in further support of their motion to dismiss the plaintiff's Complaint and in opposition to the plaintiff's motion for leave to amend the Complaint.

Plaintiff's Complaint, as amended, is nothing more than an unsuccessful attempt to allegedly cure glaring defects in the purported claims asserted in the original complaint against the defendants. Moreover, as amended, plaintiff's allegations against the defendants amount to nothing more than a request for relief relative to the issuance of a preliminary injunction in the prior pending action, for which the plaintiff should be barred from pursuing. As a matter of law, there is no cause of action for damages relative to the issuance of a preliminary injunction. Rather, plaintiff's sole remedy is to pursue the funds posted in the undertaking in accordance with the Preliminary Injunction Order.

If and when it is determined that the Preliminary Injunction Order was improperly issued, plaintiff's damages are limited to the funds posted in the undertaking, or $100,000, as previously determined by the Court. Plaintiff failed to pursue his appellate remedy relative to the issuance of the preliminary injunction, and now seeks to amend his complaint in this action to circumvent his failure to pursue that appellate remedy. Accordingly, the plaintiff's complaint as amended should be dismissed in its entirety, as it is barred as a matter of law.

Even if this Court finds that plaintiff is not barred from asserting a claim for relief relative to the issuance of the preliminary injunction at the outset, plaintiff's purported claim is time barred and fails to state any legally cognizable claim against the BURKE

Defendants, or any defendant in this action. The applicable statute of limitations for plaintiff's claim is one year.

Plaintiff cannot establish the necessary elements of *prima facie* tort. Plaintiff's amended complaint essentially alleges that the BURKE and other defendants have taken the "position" that the plaintiff is not entitled to a private easement. In sum, the BURKE Defendants have simply defended themselves in a prior lawsuit commenced by the plaintiff. The BURKE Defendants are undeniably entitled to defend themselves in the prior suit and have a vested interest in protecting their property from the potential 25' road widening easement, depicted in the plaintiff's survey. The plaintiff cannot establish that any purported "position" taken by the BURKE Defendants was motivated solely by "disinterested malevolence." Moreover, any purported statement made in the context of the 2006 action, including the alleged "joinder" of an application for injunctive relief, is absolutely privileged and thus, not actionable as alleged by the plaintiff. Plaintiff's amended complaint fails to allege with particularity special damages and/or any basis for an award of punitive damages as required.

Finally, the plaintiff has failed to overcome the requisite burden of establishing by clear and convincing evidence that the plaintiff's claim has a substantial basis in law or fact. As such, this Court must dismiss the plaintiff's complaint. The plaintiff's complaint, even as amended, constitutes and impermissible SLAPP (Strategic Lawsuit Against Public Participation) suit, for which the plaintiff has failed to demonstrate has any basis in law or fact. Contrary to the plaintiff's allegations, this suit, even as amended, falls directly within the parameters of Civil Rights Law § 76-A(1)(a), commonly referred to as SLAPP suit. Indeed, plaintiff's claim is a baseless lawsuit attempting to intimidate, bully and silence the BURKE Defendants from defending

themselves in a prior action relative to the plaintiff's claim of a purported easement over a portion of Oregon Road. Plaintiff's amended complaint alleges that the BURKE Defendants obtained a preliminary injunction and then informed unnamed, unknown third-parties about the injunction at a time and place that is not specified in the amended complaint. For this, plaintiff seeks, without the requisite specificity, no less than $60 million in damages against each defendant. Plaintiff has miserably failed to allege with any particularity any wrongful or purportedly illegal actions taken by the BURKE Defendants, even utilizing *prima facie* tort, as the proverbial dumping ground for the plaintiff's baseless claim.

This Court should deny the plaintiff's cross-motion for leave to amend and grant the BURKE Defendants' motion in its entirety.

ARGUMENT

POINT I

PLAINTIFF'S CROSS-MOTION TO AMEND THE COMPLAINT MUST BE DENIED

Leave to amend a pleading should not be freely given where the proposed amendment is palpably insufficient or patently devoid of merit. Sheila Properties, Inc., v. A Real Good Plumber, Inc., 59 A.D.3d 424, 874 N.Y.S.2d 145 (2009); Gitlin v. Chirinkin, 60 A.D.3d 901, 875 N.Y.S.2d 585 (2009). Here, plaintiff's application for leave to amend should be denied. Plaintiff's proposed Amended Complaint, asserting one cause of action for *prima facie* tort, is nothing more than an unsuccessful attempt to cure glaring defects in the plaintiff's original complaint. Plaintiff's complaint, as amended, is intended as a retaliatory lawsuit, seeking to silence, bully and intimidate the BURKE Defendants. As amended, plaintiff's "claim" for "damages" relative to the

issuance of a preliminary injunction is improper as a matter of law, time barred and does not constitute a legally cognizable claim against any defendant.

A. Plaintiff is Barred from Asserting a "Claim" for Damages Relative to the Issuance of the Preliminary Injunction in the 2006 Action

The gravamen of the plaintiff's complaint, as amended, is an action which seeks damages for what the plaintiff alleges was the erroneous issuance of a preliminary injunction in a prior pending action.[1] More specifically, plaintiff's proposed amended complaint alleges "that the defendants have sought and obtained preliminary injunctive relief prohibiting the plaintiff from exercising its full rights. . .and that the plaintiff would have been able to develop" the property but for the defendants' actions. (See, Donnellan, Aff., Exh. "A", ¶36). For this, plaintiff seeks $60,000,000 in damages against each defendant.

Plaintiff is barred from seeking recovery for a purported "claim" relative to the issuance of the preliminary injunction in the 2006 action. There is no right to recover for damages resulting from the issuance of a preliminary injunction. Reingold v. Bowins, 34 A.D.3d 667, 826 N.Y.S.2d 316 (2d Dep't 2006). Rather, CPLR § 6312(b) provides in pertinent part the following:

> "(b) Undertaking. Except as provided in section 2512, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the [defendant], if it is finally determined that he or she was not entitled to an injunction, will pay to the

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[1] The procedural history of this matter is more fully outlined in the BURKE Defendants' motion to dismiss. For ease of reference, however, on or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of Real Property Action and Proceedings Law, entitled, Seven Springs, LLC, and v. The Nature Conservancy, Realis Associates, the Town of North Castle, Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe, bearing Index no.: 9130/06 ("the 2006 action"). Moreover, a copy of the Preliminary Injunction Order is attached to the Mastellone Affirmation as Exh. "E", in support of the BURKE Defendants' motion to dismiss.

[plaintiff] all damages and costs which may be sustained by reason of the injunction."

Indeed, "'the undertaking is the source of liability and, therefore, absent an undertaking there is no right'" to recover for damage resulting from the erroneous issuance of a preliminary injunction. Id at 668. Thus, plaintiff's sole remedy is to pursue the undertaking, not to assert a claim for damages against the defendants.

Plaintiff's amended complaint, seeks monetary damages and alleges that the defendants have done nothing more than obtain a preliminary injunction in the 2006 action.[2] Plaintiff's complaint, as amended, should be summarily dismissed since plaintiff's sole remedy is to pursue damages that have been posted in the undertaking in accordance with the Preliminary Injunction Order. Id; *See also*, CPLR § 6315. Moreover, even if it is determined that the preliminary injunction was not proper, plaintiff's right of recovery will be limited to the amount of the undertaking as fixed by the Court, or as here, $100,000. *See*, CPLR § 6315.

Notably, plaintiff filed a Notice of Appeal relative to the issuance of the preliminary injunction but failed to perfect the appeal. Mastellone, Aff. Exh. "1". Moreover, plaintiff's time to perfect the appeal has long since expired. Mastellone, Aff. Exh. "1". Plaintiff's amended complaint is a transparent attempt to circumvent the expiration of plaintiff's right to appeal and to craft a remedy where none is legally recognized. In sum, plaintiff's claim is barred as a matter of law.

Accordingly, this Court should deny plaintiff's application for leave to amend and dismiss this action in its entirety.

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[2] As is discussed more fully herein, the BURKE Defendants contend that they did not "join" in the application for injunctive relief, rather, the Preliminary Injunction was issued upon the motion of co-defendant, The Nature Conservancy. Moreover, even if this Court finds that the BURKE Defendants "joined" in the application for injunctive relief, said statements are privileged and not actionable.

B. Plaintiff's Claim is Time Barred

Even if this Court finds that the plaintiff's claim for damages relative to the issuance of injunctive Order is not barred as a matter of law, the plaintiff's cause of action for *prima facie* tort is barred by the applicable statute of limitations of one year. CPLR § 215(3); Russek v. Dag Media Inc., 47 A.D.3d 457, 851 N.Y.S.2d 399 (1st Dep't 2008); Havell v. Islam, 292 A.D.210, 739 N.Y.S.2d 371 (2002).

Plaintiff's amended complaint does not cite with specificity any alleged act, which was committed by the BURKE Defendants within one year of the date the action was filed.[3] To the extent the plaintiff alleges to have a "claim" relative to the issuance of the Preliminary Injunction, this Order was issued on April 14, 2008, more than one year prior to the filing of the plaintiff's summons and complaint. Plaintiff's complaint, even as amended, is purposefully vague as to any specific acts committed by the defendants, or more importantly, when these acts were allegedly committed.

Contrary to the plaintiff's assertion, plaintiff has failed to allege any actions taken by the defendants which have resulted in any economic loss to the plaintiff. As noted above, plaintiff's "damages" are limited in this matter to the amount posted in the undertaking. Further, far from true is plaintiff's repeated assertion that he has been precluded from developing the Seven Spring parcel by any action taken by the BURKE Defendants. Indeed, the Findings Statement from the Town of Bedford indicates that the plaintiff has been approved to develop a residential subdivision of the Seven Springs lot into nine lots: seven of which are for new single-family residences ranging in size from

[3] Plaintiff's initial Summons and Complaint was filed on September 22, 2009.

6.65 to 11.26 acres.[4] (See, Mastellone, Aff. Exh. "2"). Plaintiff's amended complaint fails to identify any special damages or that the plaintiff has lost a single contract for the sale or development of any portion of its property.

Finally, plaintiff's assertion that the amended complaint in the 2009 action relates back to the 2006 action is meritless. Review of the plaintiff's amended complaint reveals that the acts, which allegedly give rise to the plaintiff's baseless claim for *prima facie* tort, did not occur until several years after the 2006 action was commenced. Thus, the allegations in the plaintiff's 2006 complaint cannot be said to have given the defendants notice of transactions or occurrences, which are alleged to have occurred years later.

Plaintiff's claims sound similar to an action for slander of title, or reputation.[5] Indeed, plaintiff contends that the defendants have taken the "position" does not have title to an easement in the lower portion of Oregon Road. A cause of action for slander of title is also governed by a one year statute of limitations period. Hanbidge v. Hunt, 183 A.D.2d 700, 583 N.Y.S.2d 288 (2d Dep't 1992).

Accordingly, Plaintiff's amended complaint asserting a claim for *prima facie* tort is time barred by the applicable statute of limitations of one year.

C. Plaintiff Fails to Establish the Elements of Prime Facie Tort

In order to establish a claim of *prima facie* tort, the plaintiff must establish (a) intentional infliction of harm; (b) resulting in special damages; (c) without any excuse or justification; (d) by an act or series of acts which would otherwise be lawful. See

[4] Further, as will be discussed more fully herein, plaintiff repeatedly claims that he is denied access to the Seven Springs parcel. The Findings Statement from the Town of Bedford, however, notes that Seven Springs parcel is accessible from alternate roadways including Sarles Street and Byram Lake Road. This is contrary to plaintiff's assertion that access can only be gained from the lower portion of Oregon Road.

[5] The elements of slander of title are (1) communication falsely casting doubt on the validity of a complainant's title; (2) reasonably calculated to cause harm, and (3) resulting in special damages. See, 39 College Point Corp. v. Transpac Capital Corp., 27 A.D.3d 454, 810 N.Y.S.2d 530 (2d Dep't 2006).

generally, Burns Jackson v. Local 100, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (1983). This cause of action was not intended to be utilized as a "catch all" dumping ground for "every cause of action which cannot stand on its legs." Curiano v. Suozzi, 63 N.Y.2d 113, 480 N.Y.S.2d 466, 470(1984). Moreover, plaintiff must allege establish that disinterested malevolence is the sole motivation for the conduct for which the plaintiff complains. R.I. Island House, LLC v. North Town Phase II Houses, Inc., 51 A.D.3d 890, 858 N.Y.S.2d 372 (2d Dep't 2008)(emphasis added).

Similar to the initial complaint, plaintiff's amended complaint does not state with particularity any wrongful conduct allegedly perpetrated by the BURKE Defendants. Rather, the amended complaint categorically alleges that the defendants have taken, and continue to take the "position" that the plaintiff has no right to access the subject parcel. The amended complaint's added feature is simply an allegation that the defendants procured a preliminary injunction and communicated the existence of the preliminary injunction (again, without specificity as to who, when or where) to third parties. In sum, the amended complaint (similar to its predecessor) alleges that the BURKE Defendants have done nothing more than defend themselves in the 2006 action.

Noticeably absent from the plaintiff's amended complaint, among other things, is any allegation of specific acts, which one may infer, that the BURKE Defendants acted solely out of disinterested malevolence, as required. Indeed, plaintiff's own submissions establish that the BURKE Defendants have a vested interest, as abutting landowners of the Seven Springs parcel, in opposing the easement. In conjunction with its application to this Court, plaintiff submits a survey of the subject parcel, upon which the Burke's property is depicted. (See, Donnellan Aff. Exh. "J"). Plaintiff has highlighted in orange highlighter a 25' road widening easement, which falls directly in the BURKE

Defendants' backyard, should the Town choose to open and/or widen the lower portion of Oregon Road. (See, Donnellan Aff. Exh. "J"). As such, the BURKE Defendants could be adversely effected if the road widening easement is effectuated. Accordingly, the BURKE defendants cannot be said to be solely motivated by "disinterested malevolence" where their property interest might be adversely effected. In this regard, the plaintiff's amended complaint simply must fail.

The plaintiff's amended complaint does not specify any particular act by any one defendant, but rather categorically states that the defendants "have sought and obtained" a preliminary injunction. Notably, the Preliminary Injunction Order specifically states that it was granted upon the motion of co-defendant, The Nature Conservancy, and not upon the application of the BURKE Defendants in the 2006 action. (See, Mastellone Aff. Exh. "E", in support of motion to dismiss complaint). The two paragraph Affirmation of John B. Kirkpatrick cannot be said to constitute the BURKE Defendants' "joining" in the application. (See, Donellan Aff. Exh. "F"). Indeed, the BURKE Defendants did not cross-move for similar relief and simply submitted a two paragraph affirmation in support of the Nature Conservancy's application.

Notwithstanding this, even if this Court finds that the submission of an Affirmation by John B. Kirkpatrick in the 2006 action amounted to "joining" in the Nature Conservancy's application, such statements made in the course of litigation in the 2006 action are absolutely privileged. Park Knoll Associates v. Schmidt, 59 N.Y.2d 205, 464 N.Y.S.2d 424 (1983). *See also*, Weiner v. Weintraub, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968); Rosenberg v. MetLife, Inc., 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007); Alan and Allan Arts, Ltd., v. Rosenblum, 201 A.D.2d 136, 615 N.Y.S.2d 410 (2d Dep't 1994). It has long been held that statements made during the course of litigation are afforded

absolute privilege. Park Knoll Associates, at 139. Accordingly, Mr. Kirkpatrick's Affirmation, a statement made during the course of the 2006 action, is absolutely privileged and is thus, not actionable in any craftily drafted complaint.

Accordingly, the plaintiff's amended complaint fails.

D. The Plaintiff has Been Approved to Pursue Development in the Town of Bedford

Plaintiff's cross-motion repeatedly states that Plaintiff's has been denied access to the Seven Springs parcel and has been precluded from exercising its property rights through the development of said property. Accordingly, the plaintiff erroneously contends that he has a cause of action in *prima facie* tort for money damages.

Contrary to the plaintiff's statements, the plaintiff has been approved to pursue development of the Seven Springs parcel in the Town of Bedford. The Findings Statement from the Town of Bedford indicates that the plaintiff has been approved to develop nine lots: seven of which will be single-family residences ranging in size, one lot of the existing "Nonesuch" home and one lot of a private equestrian facility with staff housing. (Mastellone, Aff. Exh. "2").

How can the BURKE Defendants (or any other defendant in this action) be said to have precluded the plaintiff from developing his property where plaintiff's application for development has in fact been granted. (Mastellone, Aff. Exh. "2"). Moreover, how can the BURKE Defendants (or any other defendant in this action) be said to have denied the plaintiff access to the subject premises where plaintiff's prior application for the development of the site in the Town of Bedford and Town of New Castle specifically identified and contemplated access to the residential development utilizing a new subdivision road intersection with Sarles Street (and not the lower portion of Oregon

Road) in the Town of New Castle. (See, Mastellone, Aff. Exh. "2", p. 4). Plaintiff's development proposal with the Town of Bedford does not require access over the disputed portion of Lower Oregon Road and thus, the BURKE Defendants cannot be said to have interfered with any right of the plaintiff.

E. Plaintiff has Failed to Plead Special Damages

Plaintiff's proposed Amended Complaint wholly fails to allege special damages as required for the cause of action of prima facie tort. A critical element of the cause of action of *prima facie* tort is the requirement that the plaintiff allege special damages. ATI, Inc. v Ruder & Finn, 42 NY2d 454, 458 (1977)(Court of Appeals affirmed the dismissal of plaintiff's prima facie tort cause of action as the defendants' alleged conduct simply did not constitute prima facie tort); Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143 (1985); Epifani v. Johnson, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234, 241 (2d Dep't 2009). Such special damages must be "specific and measurable." Freihofer, *supra*, at 143. Furthermore, special damages "must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts." Ginsberg v Ginsberg, 84 AD2d 573, 574, 443 N.Y.S.2d 439, *quoting* Luciano v Handcock, 78 AD2d 943, 944, 433 N.Y.S.2d 257. Special damages must not be "speculative in nature," but "clearly definable..." Beck v. General Tire & Rubber Co., 98 A.D.2d 756, 758, 469 N.Y.S.2d 783, 787 (2d Dep't 1983)(despite finding that some of the damages sought were clearly definable, dismissal of plaintiff's cause of action for prima facie tort affirmed on the basis that the plaintiff failed to plead intentional and harmful acts such as to prove prima facie tort).

Plaintiff's proposed pleadings devote just one paragraph to the issue of special damages. These alleged damages of "not less than $60,000,000.00" consist of round sums lacking any specificity or itemization, and are alleged as follows:

(a) $5,000,000.00 for Plaintiff's inability to use its purported easement;

(b) $50,000,000.00 for alleged diminution in value of the Seven Springs Parcel; and

(c) $5,000,000.00 for Plaintiff's inability to access the Seven Springs Parcel from the south at Oregon Road.

(Proposed Amd. Cplt., ¶ 50.)

By any account, these vaguely stated alleged damages are general damages and are not special damages as required to plead *prima facie* tort. "Damages pleaded in such round sums, without any attempt at itemization, must be deemed allegations of general damages." Leather Dev. Corp. v. Dun & Bradstreet, Inc., 15 A.D.2d 761, 761, 224 N.Y.S.2d 513, 513 (1st Dep't 1962), *aff'd* 12 N.Y.2d 909 (1963), *citing* Drug Research Corp. v. Curtis Pub. Co., 7 N.Y.2d 435, 441, 199 N.Y.S.2d 33, 37 (1960).

Absent from Plaintiff's allegation of purported damages is any indication of the basis of the calculation of such damages. Furthermore, Plaintiff's first and third alleged damages of $5 million each for its inability to use its purported easement and its inability to access the Seven Springs Parcel over Oregon Road (Proposed Amd. Cplt., ¶ 50), appear to be for the same alleged harm. Glaringly absent from Plaintiff's alleged damages are "specific and measurable" losses as required by New York law.

Plaintiff does not allege with the requisite specificity how any alleged action by the BURKE Defendants was the cause of such alleged damages. A *prima facie* tort cause of action has been defined as "[The] infliction of intentional harm, resulting in damage,

without excuse or justification, by an act or series of acts which would otherwise be lawful." ATI, Inc. v Ruder & Finn, *supra*, 24 N.Y.2d 458. Plaintiff simply fails to link any wrongdoing by the BURKE Defendants to its alleged $60 million damages. As stated in the BURKE Defendants' memorandum of law in support of their motion to dismiss the Complaint, the Complaint, and indeed the proposed Amended Complaint, alleges no specific tortious acts by the BURKE Defendants. Plaintiff's proposed amended pleading refers to "statements" made "upon information and belief," by "the Defendants" at large, (Proposed Amd. Cplt., ¶¶ 28 through 34) without stating (a) what the alleged "statements" entailed; (b) to whom the alleged "statements" were made; (c) when or by what mode of communication the alleged "statements" were made; nor (d) by which of the various named defendants the alleged "statements" were made. Any allegation with regard to the BURKE Defendants simply involves such defendants' efforts to defend the 2006 action against them.

Plaintiff wholly fails to state with any specificity an action by the BURKE Defendants which caused the alleged damages in excess of $60,000,000.00. Moreover, the damages amount to nothing more than general damages, at best, and not special damages as an essential element of a cause of action for prima facie tort.

For all of the reasons stated, Plaintiff failed to allege special damages and its prima facie tort cause of action should be dismissed.

F. Plaintiff is Not Entitled to Recover Punitive Damages

Plaintiff is not entitled to recover punitive damages based on its vaguely stated attempt to plead a cause of action in *prima facie* tort. Plaintiff's proposed pleadings simply do not meet the strict standard for the award of punitive damages under New York law. Plaintiff's proposed pleading alleges no less than $30,000,000.00 of punitive

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damages, purportedly based on "Defendants' unlawful, improper, and intentional acts." (See, Donnellan Aff. Exh. "A", ¶ 51). Like its purported special damages, Plaintiff devotes little attention to its allegation that it should recover no less than $30 million in punitive damages. Such purported punitive damages are not alleged with specifically as to actions by any particular defendant. As pointed out by defendant The Nature Conservancy, "[t]he proposed amended complaint offers no greater basis for punitive damages than does the original Complaint." TNC Mem. of Law, page 17. Plaintiff makes no attempt to plead with specificity how any alleged wrongdoing of the BURKE Defendants, or other defendants, are so egregious so as to merit the award of punitive damages.

The standard for an award of punitive damages is "where the wrong complained of is morally culpable, or is actuated by evil or reprehensible motives..." Walker v. Sheldon, 10 N.Y.2d 401, 404, 223 N.Y.S.2d 488, 490 (1961). Other cases historically giving rise to an award of punitive damages involve cases in which "the defendant's conduct evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations." Id., at 10 N.Y.2d 405, 223, N.Y.S.2d at 491 (*emphasis added*).

Moreover, the standard for an award of punitive damages is to be strictly applied. Rocanova v. Equitable Life Assur. Soc. Of U.S., 83 N.Y.2d 603, 613, 612 N.Y.S.2d 339, 343 (1994). There, the New York Court of Appeals dismissed all claims for punitive damages, upholding the strict standard set forth in Walker. The Court of Appeals further asserted that:

> ...a party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.

Rocanova, at 83 N.Y.2d 613, 612 N.Y.S.2d 342 (*emphasis added*).

The purported wrongdoing by the BURKE Defendants as alleged by Plaintiff consists solely of their actions in an effort to defend themselves in the 2006 action commenced against them. Plaintiff's proposed pleadings refer vaguely to "willful," and "unlawful, improper, intentional acts," by "Defendants" (Proposed Amd. Cplt., ¶¶ 41 and 51, respectively). The pleadings fail to state what exactly these "acts" are, and when they allegedly occurred. Such alleged "acts" by the BURKE Defendants certainly do not give rise to standards of punitive damage awards under New York law.

As noted in the BURKE Defendants' memorandum of law in support of their motion to dismiss, and is still the case under Plaintiff's proposed Amended Complaint, Plaintiff fails to allege any tortious conduct by the BURKE Defendants directed against the public generally. The BURKE Defendants have simply sought to defend another action against them, a right they undeniably possess. Moreover, the proposed pleadings fail to allege conduct by the BURKE Defendants rising to the level of a high degree of moral turpitude, evil motives, or wanton dishonesty as to imply a criminal indifference to civil obligations. Plaintiff simply does not, and cannot, allege conduct by the BURKE Defendants, or any of the defendants, which reaches the strict standard required of an award for punitive damages. For the foregoing reasons, punitive damages should not be awarded to the Plaintiff.

POINT II

PLAINTIFF HAS FAILED TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE A SUBSTANTIAL BASIS IN FACT OR LAW FOR ITS CLAIM

Plaintiff's primary motivation in this matter has been and continues to be to intimidate, bully, and silence the BURKE Defendants in the 2006 action. Plaintiff's complaint, even as amended, constitutes an impermissible Strategic Lawsuit Against Public Participation (SLAPP suit), based upon the provisions of Civil Rights Law § 76-a, subject to dismissal pursuant to CPLR § 3211(g), relative to the plaintiff's then pending site approval application before the Town of Bedford. Plaintiff's motivation has been and continues to be that a baseless claim for $60,000,000 in damages, where the plaintiff has already been approved to develop residential homes, will force the BURKE Defendants to succumb to the plaintiff's claimed right of easement as alleged in the 2006 action.

As has been addressed more fully infra, the BURKE Defendants contend that they did not "join" in any application for a preliminary injunction and alternatively, that their purported "joinder" is a communication that is absolutely privileged. Plaintiff's amended pleading asserts that the BURKE Defendants communicated the existence of a preliminary injunction to unknown, unnamed third-parties at a time and place that has not been identified in the plaintiff's amended pleading. Even if such a communication occurred, it is respectfully submitted that that is precisely the type of communication, which the provisions of Civil Rights Law § 76-a, were intended to protect, relative to the plaintiffs' then pending application for site approval. The BURKE Defendants should not be subject to a lawsuit, egregiously claiming $60,000,000 in damages as a means of silencing what the plaintiff's own survey establishes is a vested property interest in their own backyard.

Moreover, plaintiff's opposition to the Burke defendant's motion to dismiss, simply ignores the provisions of CPLR § 3211(g), requiring the plaintiff to demonstrate

by clear and convincing evidence that the plaintiff's claim, even as amended, has a substantial basis in law or fact. Indeed, where a moving party demonstrates that an action is a SLAPP suit, the Court must dismiss the action unless the responding party demonstrates that the claim has substantial basis in law or fact. *See*, CPLR § 3211(g); Matter of Related Properties, Inc., v. Town Board of Town/Village of Harrison, 22 A.D.3d 587, 802 N.Y.S.2d 221 (2d Dep't 2005). Indeed, the Legislature viewed "'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." *See*, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B. In this regard, the plaintiff's pleading requirements are more stringent.

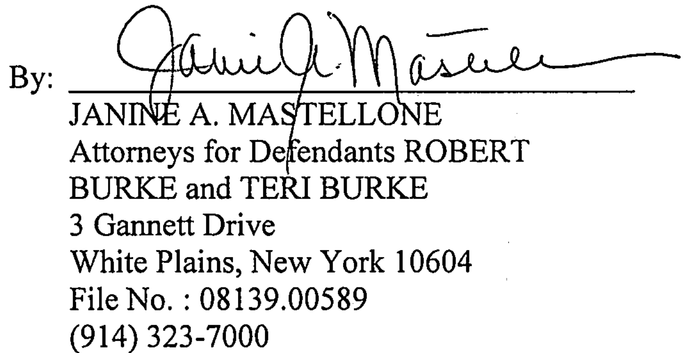
Here, the plaintiff has failed to demonstrate by clear and convincing evidence that the plaintiff's claim is substantially based in law or fact. Rather, the plaintiff's complaint, as amended, is purposefully drafted as a *prima facie* tort, which plaintiff has attempted to utilize the proverbial dumping ground for his baseless claim and this retaliatory litigation. Since the plaintiff has failed to establish by clear and convincing evidence that the complaint, even as amended, has any substantial basis in law or fact, this Court must dismiss the complaint and/or deny the plaintiff leave to amend its complaint.

CONCLUSION

For the foregoing reasons, the plaintiff's cross-motion for leave to amend should be denied and the BURKE Defendants' motion should be granted in its entirety. The plaintiff's complaint should be dismissed in its entirety.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: 

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AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Krissie Taylor, being duly sworn, deposes and says: that deponent is not a party to this action, is over 18 years of age and resides in Westchester County;

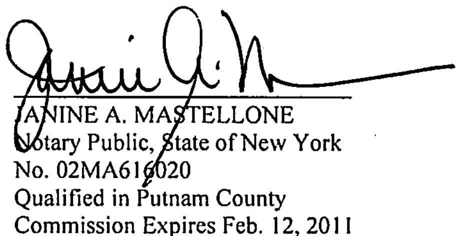
That on the 19th day of February, 2010, deponent served the within document(s) entitled Memorandum of Law in Further Support of the Burke Defendants' Motion to Dismiss the Complaint and In Opposition to Plaintiff's Motion for Leave to Amend Its Complaint upon:

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP Attorneys for Defendants NOEL DONOHOE and JOANN DONOHOE Attention: John Kirkpatrick, Esq. 120 Bloomingdale Road White Plains, New York 10605 (914) 422-3900	Benowich Law, LLP Attorneys for Defendant THE NATURE CONSERVANCY Attention: Leonard Benowich, Esq. 1025 Westchester Avenue White Plains, New York 10604 (914) 946-2400

at the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a properly addressed Federal Express wrapper, in an official depository under the exclusive care and custody of Federal Express within the State of New York.

Krissie Taylor

Sworn to before me this
22nd day of February 2010



JANINE A. MASTELLONE
Notary Public, State of New York
No. 02MA616020
Qualified in Putnam County
Commission Expires Feb. 12, 2011

2683684.1

RECEIVED
FEB 23 2010
CHIEF CLERK
WESTCHESTER SUPREME AND COUNTY COURTS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

Index No. 21162/09

REPLY AFFIRMATION IN FURTHER SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION

LOIS N. ROSEN, an attorney admitted to practice before the Courts of the State of New York, affirms as follows under penalties of perjury:

1. I am counsel to the law firm of Oxman Tulis Kirkpatrick Whyatt & Geiger LLP, attorneys for defendants Noel B. Donohoe and JoAnn Donohoe, and am fully familiar with the facts set forth herein. This reply affirmation is submitted in further support of the Donohoes' motion to dismiss the Complaint and in opposition to Plaintiff's cross-motion for leave to serve an amended complaint (the "Amended Complaint") in the form annexed as Exhibit A to the Affidavit of Alfred E. Donnellan, sworn to January 21, 2010 ("Donnellan Aff.").

2. As will be demonstrated herein, Seven Springs' cross-motion should be denied in its entirety. The sole cause of action that Seven Springs seeks to assert in the Amended Complaint, *i.e.,* its right to damages resulting from the alleged wrongful issuance of the preliminary injunction in *Seven Springs I,*[1] was already considered by Justice Rory J. Bellantoni in *Seven*

[1] As stated by Seven Springs' counsel, "[T]he instant action simply seeks to assert Plaintiff's rights to damages against the Defendants, should it be determined that the Defendants have wrongfully prevented Plaintiff from using, and exercising its rights with respect to, the Easement Area". (Donnellan Aff. ¶ 27)

Springs I.[2] The doctrine of collateral estoppel precludes Seven Springs from again raising this previously considered issue in a new action.

3. Further, Seven Springs raises scant opposition to the substantive arguments contained in Defendants' three dismissal motions (apparently banking on the fact that the Court would grant it leave to amend). As will be discussed herein, even if the Court were to consider the Amended Complaint on the merits, it does not adequately correct the deficiencies of the initial Complaint; accordingly, Defendants' respective dismissal motions should be granted. Seven Springs should not be permitted to continue burdening Defendants with significant legal fees in defending themselves against meritless litigation.

4. Despite Seven Springs' argument to the contrary, the instant action constitutes a classic example of a SLAPP suit. (*See* ¶¶ 40-41, *infra.*) Therefore, under CPLR §3211(g), it must be dismissed unless Seven Springs can demonstrate that its cause of action has a "substantial basis in law". Since Seven Springs did not even attempt to make this showing, dismissal is clearly warranted.

SEVEN SPRINGS' CROSS-MOTION SEEKING LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED BECAUSE THE AMENDED COMPLAINT SEEKS TO ASSERT ISSUES PREVIOUSLY CONSIDERED IN *SEVEN SPRINGS I*

5. Although Seven Springs correctly argues that leave to amend shall be "freely given" under CPLR 3025[3], such leave should not be granted where, as here, the gravamen of the Amended Complaint is that Defendants' allegedly wrongful action in obtaining a preliminary

[2] Unless otherwise noted herein, all terms herein shall be defined in the same manner as set forth in my prior affirmation dated December 11, 2009 ("Rosen Aff.") previously submitted in support of the Donohoes' dismissal motion.

[3] *See* Plaintiff's Memorandum of Law in Opposition to Defendants' Motions to Dismiss and in Support of Plaintiff's Cross-Motion dated January 22, 2010 ("Plaintiff's Mem"), pp. 3-4; Donnellan Aff. ¶ 29.

injunction in *Seven Springs I* caused – and continues to cause – monetary damages to Seven Springs.

6. The issues of the appropriateness of a preliminary injunction and the amount of damage that Seven Springs might suffer in the event it ultimately were determined that TNC had no right to an injunction were already carefully considered by Justice Bellantoni before he issued the Order Granting Preliminary Injunction filed and entered on April 14, 2008 (the "Injunction Order", a copy of which is annexed to the Benowich Affirmation as Exhibit 3). Copies of the transcripts of the extensive oral arguments, involving all parties which were held on March 18, 2008 and April 4, 2008 in connection with the preliminary injunction are annexed hereto respectively as Exhibits A and B.

7. Since these issues were actually raised and considered in a prior proceeding between the same parties, Seven Springs is barred by the doctrine of collateral estoppel from relitigating them in a new action. A brief history of the underlying facts will confirm for the Court that collateral estoppel applies.

8. As the Court may recall, upon motion by co-defendant TNC in *Seven Springs I*, Justice Bellantoni issued the Injunction Order, which effectively barred Seven Springs from entering upon Lower Oregon Road with any vehicle, equipment or machinery and for any other purpose than walking or hiking thereon. Seven Springs was further enjoined from performing any work upon Lower Oregon Road, such as removing vegetation or grading the roadbed. As a condition of the injunction, TNC was required to post an undertaking in the amount of $100,000.

9. TNC thereafter filed the undertaking on or about April 15, 2008. A copy of the "Notice of Filing Undertaking – CPLR 6312" is annexed hereto as Exhibit C.

10. Within a few weeks of the Injunction Order, Seven Springs filed a Request for Appellate Division Intervention ("RADI") and a Notice of Appeal dated May 8, 2008, copies of which are collectively annexed hereto as Exhibit D. In the RADI, Seven Springs set forth the issues to be raised on appeal as follows:

> Whether the Court below erred in granting TNC's motion?
>
> Whether TNC demonstrated its right to injunctive relief by establishing a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor?
>
> Whether the lower court erred in limiting the amount of the undertaking required to be filed by TNC to 100,000.00?

11. By Decision dated December 26, 2008, the Appellate Division, Second Department, entered an order granting Seven Springs' application to enlarge the time to perfect its appeal until February 6, 2009; a copy of this order is annexed hereto as Exhibit E. Seven Springs thereafter failed to perfect its appeal. As a result of its abandonment of the appeal, Seven Springs can no longer challenge Justice Bellantoni's holdings that TNC had established its right to injunctive relief or that the sum of $100,000 constituted a sufficient undertaking. The Injunction Order remains in place in the still pending action of *Seven Springs I.*

12. Following the issuance of the Injunction Order, *Seven Springs I* has essentially remained dormant. Instead, Seven Springs pursued a separate action against the Town of North Castle ("*Seven Springs II*"), which sought the incredible sum of $600,000,000 in combined compensatory and punitive damages. (*See* Complaint in *Seven Springs II,* annexed as Exhibit 4 to the Benowich Aff.) This action was settled in February 2009. (Donnellan Aff. ¶ 12)

13. In or about September 2009, Seven Springs decided to increase the pressure upon TNC, the Burkes and the Donohoes by instituting the instant action which seeks monetary damages in the astounding sum of $30,000,000 for the injuries it allegedly suffered as a result of

the wrongful issuance of the preliminary injunction[4]. Seven Springs has now sought to "up the ante" by asking the Court for leave to serve an Amended Complaint which seeks *$60,000,000* in compensatory and *$30,000,000* in punitive damages.

14. By bringing a new action which asks this Court to consider whether Defendants have interfered with Seven Springs' alleged easement right by seeking a preliminary injunction, Seven Springs is essentially asking this Court to reconsider the identical issue already decided in *Seven Springs I, i.e.,* whether TNC was entitled to the issuance of a preliminary injunction. Further, by now seeking some $90,000,000 in damages, Seven Springs is effectively asking this Court to reconsider the issue of whether the amount of the undertaking that Justice Bellantoni required TNC to post in *Seven Springs I* sufficiently covered any damages claim. If Seven Springs disagreed with Justice Bellantoni's conclusions on these issues, the proper procedure for it to have followed would have been to perfect its appeal, which it failed to do. It cannot cavalierly disregard these well-settled tenets of civil procedure and then come into Court more than a year later and ask a different judge to reconsider issues previously decided against it.

15. This Court must recognize Seven Springs' ploy and reject the Amended Complaint outright. Relevant principles of collateral estoppel bar Seven Springs from raising issues herein which could have been (and in fact were) raised and decided in *Seven Springs I.* Not only are the issues in the two cases the same; the parties to the two cases are the same as well. Seven Springs had a full and fair opportunity to contest the prior determinations, and it has only itself to blame for the consequences of its abandonment of the appeal. To hold otherwise would not only raise

---

[4] As will be discussed herein, neither the Donohoes nor the Burkes made any motion for a preliminary injunction in *Seven Springs I.* As Justice Bellantoni correctly recited in the Injunction Order, the motion was made only be TNC. Thus, it is sorely ill-conceived that Seven Springs now seeks some $90,000,000 from these defendants for their alleged "acts" in connection with the issuance of the injunction.

the spectre of inconsistent results, but it would set the procedural underpinnings of our system of jurisprudence on its ear.

16. By dismissing this action, the Court should be mindful of the fact that is not leaving Seven Springs without a remedy. When *Seven Springs I* is determined on the merits, Seven Springs will surely seek to persuade the Court of the merits of its position. If it can prove its entitlement to the implied easement and persuade the Court that the preliminary injunction should not have issued, Seven Springs can then collect from the undertaking whatever monetary damages it can prove it actually suffered as a result of the issuance of the injunction.

17. In view of the foregoing, Seven Springs' cross-motion for leave to amend should be denied. Further, as aforesaid, the Complaint, even as amended, must be dismissed as it essentially raises issues already before the Court in *Seven Springs I.* Nevertheless, should the Court wish to decide whether Defendants' dismissal motions should be granted on the ground that the Complaint (as amended) has no merit, dismissal is undoubtedly warranted for the reasons hereinafter set forth.

EVEN AS AMENDED, THE COMPLAINT
FAILS TO STATE ANY LEGALLY COGNIZABLE CLAIM

18. Seven Springs makes no meaningful effort to respond to the substance of Defendants' dismissal motions. Particularly absent, for example, is any opposition to the argument (raised in all three dismissal motions) that any actions taken or statements made by Defendants, or any of them, in defending *Seven Springs I* are absolutely privileged.[5] Thus, to the

[5] *See,* Memorandum of Law in Support of The Nature Conservancy's Motion to Dismiss Complaint dated November 16, 2009 ("TNC Mem."), pp. 10-11; Memorandum of Law in Support of the Burke Defendants' Motion to Dismiss The Complaint dated December 2, 2009 ("Burke Mem."), pp. 8-9; Memorandum of Law in Support of Noel B. Donohoe and JoAnn Donohoe's Motion to Dismiss Complaint dated December 11, 2009 ("Donohoe Mem."), pp. 10-11).

extent that any of the Defendants may have taken action in connection with the issuance of the injunction in *Seven Springs I*, such action is privileged and not subject to suit.

19. Effectively conceding (as Defendants each averred in their respective motions) that its original complaint failed to contain any legally cognizable cause of action, Seven Springs now seeks to serve an Amended Complaint containing one cause of action, which (according to Seven Springs) sounds in *prima facie* tort. As will be discussed herein, the allegations set forth in the Amended Complaint are insufficient to state a valid cause of action under this legal theory.

20. Four elements are necessary to assert a cause of action for prima facie tort. There must be (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts that would be otherwise lawful. In addition, the plaintiff must allege that "disinterested malevolence" is the sole motivation for the conduct of which plaintiff complains. (*See* Plaintiff's Mem., pp. 4-5.) A review of the allegations contained in the Amended Complaint makes it clear that they do not state a valid cause of action for *prima facie* tort.

A. <u>Seven Springs fails to sufficiently allege special damages</u>.

21. Most obviously, Seven Springs does not allege special damages with the requisite particularity. As a matter of law, special damages (which are the only type of damages recoverable in an action for *prima facie* tort), must be pled with "sufficient particularity" so as to identify any actual losses and must be causally related to any alleged tortious acts.

22. Seven Springs alleges only that it has suffered "actual and special damages" of not less than $60,000,000 as follows: (a) $5,000,000 for its inability to use the Easement; (b) $50,000,000 for the diminution in value of the Seven Springs Parcel; and (c) $5,000,000 for its inability to access the Seven Springs Parcel over Oregon Road. (Amended Complaint ¶ 50) This

general allegation of loss is clearly not sufficient to allow for recovery of special damages under a *prima facie* tort theory.

B. Seven Springs' allegations that "Defendants" engaged in an "act or series of acts" which caused it harm are contradicted by the underlying facts.

23. Seven Springs cannot truthfully allege that Defendants, particularly the Donohoes, intentionally engaged in any "act or series of acts" which caused it harm. At most, the Amended Complaint contains two purported "acts" committed by all Defendants generally: (1) wrongfully seeking and obtaining the preliminary injunction in *Seven Springs I*; and (2) making statements to members of the Board of North Castle and the Board of Bedford. The vague and conclusory allegations contained in the Amended Complaint are wholly insufficient to demonstrate that any of the Defendants, and particularly the Donohoes, engaged in any sort of conduct or committed any "act" which damaged Seven Springs in any way. To the contrary, the underlying facts demonstrate that the Donohoes engaged in no behavior which in any way could be construed as causing Seven Springs harm.

1. The Donohoes engaged in no "acts" relating to the issuance of the Injunction Order.

24. Seven Springs' allegation that *all* of "the Defendants have sought and obtained preliminary injunctive relief prohibiting Plaintiff from exercising its full rights to the Easement" (Amended Complaint ¶ 36) is simply untrue. The only party that sought a preliminary injunction was TNC, as Justice Bellantoni expressly acknowledged in the Injunction Order. Indeed, Seven Springs acknowledged in 2008 that TNC was the sole movant as its RADI speaks in terms of "*TNC's* motion" and not "*Defendants'* motion". Thus, Seven Springs' charge that the Burkes and the Donohoes "joined in" the motion (Donnellan Aff. ¶ 13) is simply incorrect.

25. The entirety of the Burkes and the Donohoes' submission in connection with the preliminary injunction motion consists of a two-paragraph "reply affirmation" from John B.

Kirkpatrick, their counsel in *Seven Springs I.* After an introductory paragraph, Mr. Kirkpatrick then avers that, "The Individual Defendants support TNC's motion and believe that TNC is entitled to the injunctive relief that it now seeks from this Court". (*see* Donnellan Aff., Exhibit F) This one simply declaratory sentence (which, as demonstrated heretofore, is absolutely privileged because it was made in connection with an ongoing litigation) simply cannot be used as a springboard for claiming that the Donohoes are liable under a *prima facie* tort theory.

2. The conclusory allegations that Defendants made "statements" to Town officials that caused damage to Seven Springs are unreasonably vague and contradicted by the relevant facts.

26. Perhaps because it recognized that any statements made in connection with the issuance of the preliminary injunction are privileged and therefore not actionable, Seven Springs now seeks to include a second possible "act" committed generally by all "Defendants" in the Amended Complaint: statements made to "third parties" which purportedly impugned Plaintiff's title and asserted "in sum and substance" that "Plaintiff has no right, title or interest to the Easement". The Amended Complaint then contains a series of non-specific boilerplate allegations to the effect that these alleged statements were "false and untrue"; known by Defendants to be false; intentionally communicated, even though Defendants "knew, or should have known, that it would result in harm to Plaintiff's interest in the Seven Springs Parcel"; and communicated "maliciously with the intent to injure Plaintiff". (Amended Complaint, ¶¶ 28-35)

27. These vague and conclusory allegations wholly fail to meet the particularity requirement of CPLR § 3013. They fail to provide sufficient notice of any "transactions, occurrences, or series of transactions or occurrences" purportedly engaged in by Defendants. There is no allegation as to which Defendants allegedly made statements, when such statements were made or to whom such statements were made, Indeed, Plaintiff alleges that statements

were made to "members of the Board" of Bedford and North Castle; it does not even allege which "Board" in each town was purportedly spoken to by Defendants. Surely, if Seven Springs is seeking some $90 million in damages herein, Defendants are entitled to some notice as to exactly what statements were allegedly made and by whom.

28. Further, even if the Court were to conclude that these allegations provided sufficient detail as against *all* Defendants, they nevertheless are improper because the underlying facts contradict Seven Springs' claim. Seven Springs cannot truthfully allege its ability to develop the Seven Springs Parcel was impeded in any way by any statements made by Defendants, particularly the Donohoes.

29. With respect to that portion of the Seven Springs Parcel which is located in the Town of North Castle, Seven Springs withdrew the application that it made to the North Castle Planning Board in August 2007, some eight months *prior* to the Injunction Order. A copy of the letter dated August 10, 2007 from Seven Springs' counsel to the Town of North Castle Planning Board is annexed hereto as Exhibit F. Since there was no development proposal before North Castle at the time the injunction issued or thereafter, it is impossible to conceive of how any statements allegedly made at that time by the Donohoes could have adversely impacted upon a non-existent development proposal.

30. With respect to that portion of the Seven Springs Parcel which is located in the Town of Bedford, Seven Springs' vigorous pursuit of its application to develop the Seven Springs Parcel was unaffected by the issuance of the preliminary injunction. Annexed hereto as Exhibit G is a copy of the lengthy "Findings Statement Seven Springs Subdivision and Equestrian Facility, Town of Bedford, New York", marked "*Final 6/3/09*"" ("Findings Statement"). The

Findings Statement describes the project as consisting of seven lots for new single-family residences, one lot for the existing residence and one lot for a private equestrian facility[6].

31. A review of the Findings Statement makes it clear that Seven Springs, in the months both *before* and *after* the Injunction Order, was not at all hamstrung by any statements allegedly made by the Donohoes or any of the other Defendants. To the contrary, the "proposed Bedford only subdivision plan" was before the Lead Agency by no later than October 30, 2007 – months before there was any injunction.[7] Over the course of the next 18 months or so, Seven Springs took significant steps toward moving the environmental review for this development proposal forward, as the following timeline (gleaned from the Introduction to the Findings Statement) makes clear:

> June 10, 2008: Acceptance of the DEIS for the Bedford only plan by the Lead Agency and the filing of the DEIS and Notice of Completion
>
> July 29, 2008: Holding of a Public Hearing on the DEIS by the Lead Agency
>
> August 29, 2008: Closing of the public comment period on the DEIS
>
> March 27, 2009: Acceptance of the Final Environmental Impact Statement ("FEIS") by the Lead Agency and the filing of the FEIS and Notice of Completion
>
> April 30, 2009: Closing of the public comment period on the FEIS

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[6] The Findings Statement puts the lie to Seven Springs' claim that "The only viable secondary access to the Seven Springs Parcel is from the south" via Lower Oregon Road. (Amended Complaint ¶ 25; Donnellan Aff. ¶ 34) The original plan for the Seven Springs Parcel was to construct a private golf club (with appurtenant facilities) and nine single-family residences. Access to the project was described as follows:

> Primary access to the golf club was to be provided from the existing site driveway on Oregon Road. *Access to the residential development in New Castle and North Castle was to be provided from a new subdivision road intersecting with Sarles Street in the Town of New Castle.* (Findings Statement, p. 4)(emphasis added)

Since a connection with Sarles Street was "viable" originally, it is difficult to understand why Lower Oregon Road has now become the only "viable" access for the project.

[7] The fact that Seven Springs decided to proceed with its "Bedford only subdivision plan" months before any injunction was sought contradicts its allegation that Defendants' actions caused Bedford to refuse "to permit development of the entire Seven Springs Parcel". (Amended Complaint ¶ 26)

June 3, 2009: Adoption of the Findings Statement by the Lead Agency.

32. Since Seven Springs successfully completed the environmental review for its project in the months following the issuance of the Injunction Order, clearly none of Defendants' alleged "statements" impeded its efforts in any way.

C. The Donohoes are not solely motivated by "disinterested malevolence" as required for a *prima facie* tort claim.

33. Seven Springs' allegation that "disinterested malevolence is the sole motivation for Defendants' actions" (Amended Complaint ¶ 41) is both insufficient and untrue. Seven Springs does no more than regurgitate this *pro forma* allegation so that it can technically satisfy the pleading requirement necessary to assert a *prima facie* tort claim. Such a conclusory allegation should be deemed insufficient where, as here, it is clearly untrue as to the Donohoes for several reasons.

34. First, since Seven Springs sued the Donohoes in 2006 in *Seven Springs I*, it is inconceivable and wholly illogical to characterize the Donohoes' actions in defending themselves as being motivated by "disinterested malevolence".

35. Second, the Donohoes' deed, a copy of which is annexed to the Donnellan Affidavit as Exhibit H, contains the following reservation:

> Reserving to the party of the first part for the purposes of dedicating to the Town of North Castle, a twenty-five foot road widening easement, as shown on Map No. 22547, the future widening of Oregon Road. Seller retains this easement for purposes of dedication to the Town of North Castle.

In the event that Seven Springs is successful in *Seven Springs I*, it is possible that the Town of North Castle may seek to widen the road in such a way that it would run across the Donohoes' existing backyard. Thus, far from being motivated by "disinterested malevolence", the Donohoes

are motivated by their legitimate interests in protecting their property rights and maintaining the value of their home.

36. In view of the foregoing, it is clear that the Amended Complaint does not (and cannot) state a valid cause of action for *prima facie* tort as against the Donohoes.

THE AMENDED COMPLAINT IS
<u>BARRED BY THE STATUTE OF LIMITATIONS</u>

37. Seven Springs seeks to avoid the one-year statute of limitations applicable to *prima facie* torts by arguing that a three-year statute of limitations applies because "the injury alleged is essentially to the plaintiffs' economic interests, rather than to their reputation". (Plaintiff's Mem. pp. 9-10) Seven Springs' argument, albeit creative, is unpersuasive.

38. The statute of limitations for the deliberate conduct at issue here is one year, not three. Since the Injunction Order was issued well over a year prior to the commencement of this action, Seven Springs tries to avoid this limitations bar by asserting that its damages are "continuing". In support thereof, Seven Springs cites to cases "involving continuous or repeated injuries", such as trespass and nuisance cases (*see* Plaintiff's Mem. p. 10). Such cases are inapplicable where, as here, Seven Springs is relying on a *prima facie* tort theory.

39. In addition, Seven Springs should be estopped from arguing that its claim for *prima facie* tort presents an ongoing or continuing tort. The Defendants have not engaged in "continuing actions precluding Plaintiff's use of the Easement Area". (Plaintiff's Mem. p. 10) Plaintiff's use of the Easement Area is being precluded by the Injunction Order, not by any actions of Defendants. If Seven Springs thought that it would be damaged because it could not use the Easement Area, it should have perfected its appeal from the Injunction Order. If it has actually suffered any economic injury from the Injunction Order (a hugely speculative claim at

best), it has only itself to blame. It should not be permitted to transfer any damages resulting from its own failure to act to Defendants upon a feigned "continuing wrong" theory.

THE INSTANT ACTION
CONSTITUTES A CLASSIC "SLAPP" SUIT

40. It is the ultimate irony that Seven Springs simultaneously asserts that this action is not a "SLAPP suit" but also seeks to allege in the Amended Complaint that it was damaged by "statements" that Defendants made to the Boards of the Towns of Bedford and North Castle. (Plaintiff's Mem. p. 8) What better way to silence or intimidate Defendants than to sue them for alleged statements that they made to the Boards of these two towns? Surely, Civil Rights Law §§70-a and 76-a were enacted for the specific purpose of protecting the rights of individuals who wish to make "statements" at public meetings against proposed land use developments. (*See* Donohoe Mem. pp. 8-9.)

41. Seven Springs argues that this action does not fall within the SLAPP statute because it is not a "'public applicant or permitee' within the meaning of Civil Rights Law § 76-a." (Plaintiff's Mem. p. 9) In support of this argument, Seven Springs asserts that "there is no currently pending application to develop the portion of the Seven Springs Parcel located in North Castle". (Plaintiff's Mem. p. 9)

42. While Seven Springs' assertion is correct insofar as it goes, it conveniently ignores the fact that Seven Springs has continued to proceed with its application before the Town of Bedford. Seven Springs has completed all environmental review required in connection with this project, and is now poised to begin the process of obtaining subdivision approval for the project outlined in the Findings Statement. Accordingly, Seven Springs clearly is a "public applicant" within the meaning of the Civil Rights Law. Therefore, under the "heightened scrutiny" standard of CPLR § 3211(g), the Complaint must be dismissed.

THE CLAIM FOR PUNITIVE
<u>DAMAGES SHOULD BE DISMISSED</u>

43. Seven Springs has argued that punitive damages can be awarded where a party can show "the existence of circumstances of aggravation or outrage, such as spite, or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interest of others that the conduct may be called willful or wanton". (Plaintiff's Mem. p. 11)

44. Since it is clear that the underlying facts herein cannot remotely be construed to support any such possible "spite, or malice, or a fraudulent or evil motive", Seven Springs' claim for punitive damages should be dismissed.

WHEREFORE, for the reasons set forth hereinabove, the Donohoes respectfully request that the instant motion be granted in its entirety and that Seven Springs' cross-motion be denied.

Dated: White Plains, New York
February 19, 2010

LOIS N. ROSEN

A

Exhibit A

1

2 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER PART RJB
3 ----------------------------------X

4 SEVEN SPRINGS, LLC., :

5 Plaintiff, :

INDEX #
6 -against- : 9130/06

7 THE NATURE CONSERVANCY, :
REALIS ASSOCIATES,
8 THE TOWN OF NORTH CASTLE, :
ROBERT BURKE, TERI BURKE,
9 NOEL B. DONOHOE and JOANN :
DONOHOE,
10 :
Defendant.
11 :
----------------------------------X
12

Westchester County Courthouse
13 111 Dr. Martin Luther King Blvd.
White Plains, New York 10601
14 March 18, 2008

15 BEFORE:

16 HON. RORY J. BELLANTONI,
Acting Justice of the Supreme
17 Court

18

19

20

21

22

HOWARD BRESHIN,
23 SENIOR COURT REPORTER

24

25

1
2 APPEARANCES:

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& WIEDERKEHR, LLP
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5 White Plains, New York 10601
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13 Attorneys for Defendant Town of North Castle
175 Main Street
14 White Plains, New York 10601
BY: GERALD REILLY, ESQ.
15 CHRISTEN HOLT, ESQ.

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THE COURT: Can I have your appearances.

MR. DONNELLAN: Alfred Donnellan, Delbello, Donnellan, Weingarten, Wise and Wiederkehr, attorneys for the plaintiff.

MR. WANK: Bradley Wank, Delbello, Donnellan, Weingarten, Wise & Wiederkehr for the plaintiff.

MR. BENOWICH: Leonard Benowich, Benowich Law, LLP for the defendant Nature Conservancy.

MR. KIRKPATRICK: John Kirkpatrick, Oxman, Tulis, Kirkpatrick, Whyatt and Geiger, LLP, for the Defendants Burke and Donohoe.

MR. REILLY: Gerald Reilly, Stephens, Baroni, Reilly and Lewis for the Town of North Castle.

MS. HOLT: Christen Holt, Stephens, Baroni, Reilly and Lewis for the Town of North Castle.

THE COURT: This case was originally assigned to Judge LaCava, is

that correct?

MR. DONNELLAN: Yes, your Honor.

THE COURT: The Appellate Division sent it back in February. Was it reassigned to a judge, or am I the judge?

MR. BENOWICH: Our understanding is, you're the judge, your Honor.

We came in Friday, submitted the TRO application that is before you. It was originally assigned to Justice Donovan who is on vacation, we understand from his law secretary.

As of Friday, we thought it was being assigned to Justice Rosato as the duty judge. We were then contacted Friday evening by Mr. Eagen from Justice Donovan's chambers that the assignment policy at the courthouse is that it won't go to a judge who is away if it requires his signature while he is away, so it won't go to him if it has to go to the duty judge.

THE COURT: That is the Order to

Show Cause, though.

MR. BENOWICH: My understanding, and I didn't speak to Mr. Eagen, I don't profess to know what the policy on reassignment is, I think that is the message we got from him when he said it was being sent to your Honor and that your Honor would hear it.

Yesterday we thought then your Honor was assigned.

THE COURT: I was out sick yesterday and I didn't sign anything, and I apologize because had I been here, had I been here when this came in, I don't think it came into us yesterday morning. I know it was in the clerk's office on the 14th, but we didn't get it until yesterday morning.

Actually it was in the afternoon my law clerk called me. I probably would have signed the request for the TRO and given everybody more time to get ready for the preliminary injunction. I don't know if we will go

2 forward with that today.

3 If you want more time or if you

4 are ready to go forward, you know, with

5 a more substantial type of argument and

6 hearing than requesting the TRO is

7 moving quickly for me.

8 I was handed the reply papers or

9 the answering papers ten minutes ago,

10 so while I read the moving papers, I

11 haven't had a chance to read these. My

12 question was to the underlying action,

13 given the Order to Show Cause comes in

14 to somebody and is randomly assigned,

15 you know, the underlying action were

16 assigned to me, and you can have a

17 seat, I know this is going to be a

18 while.

19 I am not quite sure why it

20 wouldn't have been kicked back earlier,

21 and I would have been in a position to

22 have read these papers, I'm talking

23 about Seven Springs declaratory

24 judgment action, the fact that you

25 moved by order to show cause for the

preliminary injunction, and that is a sign to me, does that drag with it the declaratory judgment action, does anybody know?

MR. DONNELLAN: My understanding is that it does.

MR. REILLY: I spoke to Judge LaCava's clerk, and as late as when this action started, they were unaware of the Appellate Division decision, but I was told that because of Judge LaCava doing the interim, it will not be with him, it will be reassigned.

MR. DONNELLAN: Kevin Eagen told me when he went to Judge Rosato's chambers, they pointed out the policy was that if the case is being reassigned, which is our understanding it was being reassigned to Judge Donovan for all purposes, that if that judge is away unavailable and there is some application that requires immediate attention, that it goes back into the Assignment Part to be

reassigned, and that's what Kevin told me, that the whole case was being reassigned. That's what he told me.

THE COURT: I find it problematic, and this isn't perhaps for you folks to resolve or even deal with, but if this had been sent back to a judge when the Appellate Division had kicked it back, there might have been a conference and no need for this new Order to Show Cause, and the Appellate Division sends it back, it should come back to a judge and the judge should contact you folks and everybody should decide how to proceed without having to bring an Order to Show Cause on, so from the time the Appellate Division decided this case until now, you folks haven't heard from any Justice of the Supreme Court or acting Justice at all in relation to this matter.

MR. BENOWICH: That's correct. I think the only thing-- I don't mean to cast an aspersion, I think plaintiff's

1
2 counsel filed a notice of entry of the
3 Appellate Division decisions and order
4 in the Appellate Division. I am not
5 aware that one was filed in this
6 Supreme Court Clerk's Office which
7 might have triggered something, so I
8 just can't answer that, but I do agree
9 with plaintiff's counsel that it was
10 our understanding that this case was
11 assigned to your Honor for all
12 purposes.
13 THE COURT: Okay. I just want you
14 to be aware, then, the only thing I
15 have is the Order to Show Cause that
16 was filed on Friday and got to me
17 yesterday. They didn't, or as of yet
18 have not gotten all the original papers
19 that were filed and sent them to me, so
20 the only thing I know of the underlying
21 action came by way of the exhibits.
22 MR. BENOWICH: I appreciate that,
23 your Honor. We did attach all the
24 pleadings. That is all there is
25 because the case that came back came

back after the reversal of a motion to
dismiss the complaint, so without
getting ahead of your Honor, the only
pleadings and the only papers in the
case are the complaint, now the answers
by each of the defendants, and we have
served discovery demands, and then we
found out what was going on and we made
this application.

THE COURT: The original action
was brought on by Seven Springs, and
anyone feel free to jump in here and
help me because I am dealing with these
facts in my mind 24 hours old, but in
any event an original declaratory
judgment action, there was the
complaint, the answer.

MR. BENOWICH: No answer, there
was a pre-answer motion.

THE COURT: 3211. The order that
Judge LaCava wrote between the time
that-- well, there was no answer?

MR. REILLY: No, your Honor.

MR. BENOWICH: The case was

1
2 dismissed, your Honor.
3 THE COURT: I have answer of
4 defendant Nature Conservancy.
5 MR. BENOWICH: That was served
6 last week.
7 THE COURT: That was served last
8 week.
9 MR. BENOWICH: The entire action
10 was dismissed as a result of Judge
11 LaCava's decision. The appeal was
12 filed and heard last November, decided
13 in February. Following that we all
14 filed answers in discovery, so nothing
15 had happened in the action since I
16 think it was November of '06 when Judge
17 LaCava's decision came down and
18 essentially February of this year,
19 except whatever happened at the
20 Appellate Division.
21 THE COURT: Well, when the matter
22 first came on by the complaint and then
23 there were motions to dismiss prior to
24 answer, was a stay put in place by
25 Judge LaCava at all to prevent what is

2 happening now from happening?
3 MR. DONNELLAN: No.
4 MR. BENOWICH: There was no
5 suggestion like anything that is
6 happening now was going to happen. It
7 didn't happen.
8 In fact, one of the things we
9 pointed out in our papers is what
10 happened recently is the first time it
11 happened since Seven Springs, in our
12 understanding, took title in 1995. It
13 was, we believe, a direct consequence
14 of an inflated view of what the
15 Appellate Division did and didn't
16 decide.
17 THE COURT: Now, just so I am
18 clear, the last exhibit, maybe it's not
19 so clear, but the last exhibit dated
20 August 10th, 2007 to the moving papers
21 is a letter, purports to be a letter
22 from Mark Weingarten indicating that
23 Seven Springs asked to advise the
24 Planning Board that it withdrew any
25 application being made to the Planning

1
2 Board for approval of a subdivision of
3 the portion of the property within the
4 Town of North Castle. That would seem
5 to me at least --
6 MR. DONNELLAN: Let me see if I
7 can clarify it and I will give you a
8 little background on the property and
9 maybe that will help.
10 The property is actually in three
11 towns, it's in North Castle, Bedford
12 and New Castle, and Seven Springs had
13 an application pending before North
14 Castle and Bedford who acted as dual
15 lead agencies for a residential
16 development consisting of, I believe,
17 17 homes to be developed on, between
18 the two parcels abutting both towns.
19 New Castle was kind of out of it
20 because there wasn't any new proposed
21 development on the New Castle part of
22 the property. In connection with that
23 application and them acting as lead
24 agency, the main access to that
25 proposed development was from the

Bedford part of the project.

Bedford had a problem in that sense of emergency services would be required to service those homes if and when built from the Bedford side. They had an ordinance that restricted the number of homes that could be on a dead-end street or a cul de sac, and the 17 homes that were proposed exceeded that and therefore secondary access would be required.

The secondary access to this site is the south side of Oregon Road which is the disputed road between the parties here today.

The Town of North Castle and the Nature Conservancy had maintained that Seven Springs did not have right of access over that road. Seven Springs maintained that in any event it had at least a private right of access.

It was a public road for some period of time. The road, there has been a road for approximately 100

years. At some point in time it became a public road because of use by the public, but in or around 1990, the Town of North Castle discontinued the road and essentially closed it for public purposes.

The issue that came up with Judge LaCava and ultimately with the Appellate Division was whether or not that cut off the private access.

Judge LaCava dismissed the action, didn't really mention public private in his case, said the road is closed and that's it, and the Appellate Division made the decision just because you close off a public road doesn't cut off private rights.

THE COURT: Let me ask you this. It was nice of the Appellate Division to say that, but did they in essence affirm that part of the decision that dismissed as to the public road?

In other words, is that issue now resolved in front of me? Are we going

to have a discrepancy as to what the Appellate Division did?

MR. DONNELLAN: I don't think so.

THE COURT: As to whether or not the public road was closed?

MR. DONNELLAN: No, your Honor.

THE COURT: That has not been resolved?

MR. DONNELLAN: No.

THE COURT: It seems to me the Appellate Division said with respect to the public road, to the extent that's been resolved, there is still an issue as to whether or not a private easement has been granted.

MR. DONNELLAN: Correct.

THE COURT: They could have been a little clearer. I am not sure whether they did dismissed that portion that said it's not a public road, or sent it back saying as a matter of law, that the 3211 motion, the defendants haven't proven that they will succeed as a matter of law and that these issues

should be heard.

Again, I am just reading this decision for the first time today.

MR. DONNELLAN: I understand. From our prospective, and what we are focused on, and I don't know that I am prepared to say that it's not a public road, but since we are the beneficiary of the private road, we have the right to use it anyway, so, you know, and the issue before the Court today on this Order to Show Cause does relate to our right to use the road, but I started to try to explain something to your Honor about the development because you referenced Mark Weingarten's letter.

THE COURT: Yes.

MR. DONNELLAN: When we were having problems using the road, right, because of the positions taken by the Town and by the Nature Conservancy, our lawsuit we lost with Judge LaCava, he dismissed the case, so the project was revamped, and they reduced the number

2 of homes and only applied to Bedford
3 for six homes. That is permitted under
4 their Zoning Code.
5 That application is pending and
6 progressing, and frankly, we expect it
7 to be approved, but that would only be
8 for the six homes access only from the
9 Bedford side, so with the thought being
10 that if and when we are successful and
11 we can use the Oregon Road, maybe some
12 different project is on the North
13 Castle side. It's a big piece of
14 property and a lot of it wasn't going
15 to be developed anyway, so we need the
16 access from this side to service an
17 existing home which is there that Mr.
18 Trump resides in.
19 There is a driveway that comes
20 down to the Oregon Road in question
21 here that gives access to that home.
22 It does have access on the Bedford side
23 as well, so it has dual access and also
24 to service that property.
25 The utilities currently come up

that road, and Con Edison has been on that road to service those utilities.

THE COURT: I guess my question was more aimed at if that portion had been abandoned, I guess it would be reasonable for everyone to assume that a stay wouldn't have been necessary in that this would have played itself out, a preliminary injunction the way that everybody might suppose it's a declaratory judgment action, you are seeking to have those rights declared by the Court, and then all of a sudden we have somebody in there destroying in one sense property, and in somebody else's opinion creating what you are entitled to create.

I guess what I am trying to figure out, why somebody jumped the gun in here and went in there and started clearing.

MR. DONNELLAN: The road is already there. The road has been there a hundred years. I have been there.

2 The road is cleared. Some weeds grow
3 on it, some twigs and some logs fall on
4 it, but the road is there and it's been
5 there for a very, very long time, and
6 it's accessed, like I said, by Con
7 Edison for utility purposes. It has
8 been accessed from the north by my
9 client for some period of time.
10 THE COURT: When you say from the
11 north, the portion of the road beyond
12 where the gate was put up or the gate
13 was changed?
14 MR. DONNELLAN: Where the gate was
15 put up, and it's also an important
16 point, we actually own that property.
17 There is only a very small portion of
18 this property, of the road that is
19 claimed to be owned by the Nature
20 Conservancy. The bottom portion of
21 it --
22 THE COURT: You own the property
23 where the gate is actually located?
24 MR. DONNELLAN: Yes, your Honor.
25 THE COURT: How far beyond that

2 gate does the ownership become

3 disputed?

4 MR. DONNELLAN: A hundred yards,

5 maybe, something like that, a hundred

6 yards.

7 The piece of property that is down

8 by the gate was acquired by Seven

9 Springs, and then it also owns a large

10 piece of property up in the north where

11 this Oregon Road goes to, and a portion

12 of that Oregon Road is also owned by

13 Seven Springs. It's a piece in between

14 where the Nature Conservancy owns both

15 sides of that road.

16 MR. KIRKPATRICK: Your Honor, the

17 matter of the gate is somewhat in

18 dispute. Our position would be that

19 Seven Springs has purchased half the

20 right-of-way and the Nature Conservancy

21 owns the other half of the

22 right-of-way, so the gate is arguably

23 half along his property.

24 MR. DONNELLAN: I would agree with

25 that.

1
2 MR. REILLY: Judge, if I can just
3 add in response --
4 THE COURT: Which half.
5 MR. DONNELLAN: The west half?
6 THE COURT: From the center of the
7 roadway.
8 MR. DONNELLAN: Correct.
9 THE COURT: We are talking about
10 now splitting somewhere in the middle?
11 MR. DONNELLAN: Yes. That is
12 actual ownership. Anyone who owns to
13 the center line of that road has a
14 right of access for ingress and egress
15 over the entire road, they do and we
16 do.
17 THE COURT: I am just trying to
18 understand what has happened to the
19 land. I have an affidavit from someone
20 who lives nearby who tells me there was
21 somebody in a truck in there pulling
22 some weeds up. There is an allegation
23 of irreparable harm.
24 I am not sure if those folks were
25 on your property weeding it or on their

2 property.

3 MR. DONNELLAN: The road is a dirt

4 road fairly wide that goes all the way

5 up, and there was some light

6 maintenance of the road that included

7 removing some weeds, twigs that are on

8 the road but not doing anything else.

9 THE COURT: Is that portion of the

10 road, is it undisputed who owns that,

11 or is it on the disputed parcel? You

12 said it is about a hundred yards in.

13 MR. DONNELLAN: It is both. A

14 hundred yards in they claim to have

15 ownership of it. Maybe they do, maybe

16 they don't, but we certainly don't own

17 it. We are not saying we own it, but

18 we have a private easement over it, and

19 the Appellate Division has, number one,

20 found that we have stated a claim, a

21 proper claim and a cause of action for

22 that right over it, and the facts with

23 respect to that claim, your Honor, are

24 not disputed. It's a chain of title.

25 THE COURT: Just hold onto it for

one second, because even if you have a private easement over it, would you argue that gives you the right to maintain the property?

MR. DONNELLAN: Yes, your Honor.

THE COURT: Or to effectuate emergency, let's say. Obviously if you have an easement, you have a right-of-way. There is a tree that is in the middle of the road, you can't exercise use over the easement.

I can understand clearing the tree, but beyond that, if you concede you don't have it but have a right of easement, shouldn't the people who own it be the ones who effectuate any change to that property?

MR. DONNELLAN: No, your Honor. We have a right to maintain our access. Now, anything beyond that in terms of cutting down trees--

THE COURT: Well, that's what I am asking. I said if the road is blocked, maintain the access, but now moving to

the shoulder of the road and cutting down existing trees or widening the road --

MR. DONNELLAN: Your Honor, number one, that was not done.

THE COURT: Okay.

MR. DONNELLAN: Number two, right, we could not do that because we would need permits for that from the municipality, so anything involving any improvement of the road or clearing trees, there is a tree cutting ordinance in the Town of North Castle. They're certainly paving the road or making any improvements for which a permit would be required, my understanding it was not done.

MR. REILLY: Before you go on and say anything--

THE COURT: Please. Is it your position you will be able to get those permits with an easement ownership or that the owner of the property would have to apply? An easement would give

2 you a right to apply for the permits.

3 MR. DONNELLAN: Yes, your Honor.

4 MR. BENOWICH: But they haven't

5 done that, your Honor, and your Honor

6 focused, with the papers only for 24

7 hours you focused on the key.

8 The fact is, since they own the

9 property, whatever they own since 1995,

10 they never before undertaken to do what

11 they did, and frankly, with the reply

12 papers, the opposition papers you got,

13 they don't dispute it.

14 There is nobody from Seven Springs

15 who says we didn't do that, we did

16 this. They admit by their silence what

17 was done. The question is for this

18 Court to determine as the Appellate

19 Division said, they have a claim, Judge

20 LaCava said they didn't have a claim,

21 the Appellate Division says they have a

22 claim.

23 As long as I have been practicing

24 in New York, a claim doesn't mean you

25 have the right to ask the Court to say

2 you have.
3 They claim that the only issue in
4 this case is a matter of deeds.
5 They're wrong. If your Honor read our
6 memorandum, you will see the cases.
7 The fact is, the entire circumstances
8 of the grant from Mr. Meyer's
9 foundation to the Nature Conservancy
10 which eponymously and self-evidently is
11 a nature preserve.
12 What the plaintiff wants to do,
13 without having filed a development
14 application or permit to build a road,
15 is to clear what has at least since
16 they owned their land in 1995, to clear
17 a road.
18 Why do they need to do that? It's
19 been a hiking preserve, essentially at
20 all times relevant. What are they
21 trying to do other than to tweak
22 everybody here including the Court
23 because this Court, as your Honor
24 correctly said, is here to declare the
25 rights and the parties as to the claim

of the easement.

That means at the end of the day your Honor will say they do or they don't have the rights they claim. We do or don't have the rights we claim to have.

If your Honor determines that they don't have the easement they claim, your Honor will have to enter a declaration that they don't have it.

If they are permitted to access as if they have the easement they claim, do whatever maintenance they claim and whatever else they claim will come under the rubric of maintenance, it frankly tends to render your judgment ultimately ineffectual, because what they have done is changes our property which self-evidently is a nature preserve, and they make it a little pristiner, a little cleaner.

They already scraped the surface of the road. It is no longer the unpaved dirt footpath as counsel said.

2 It's not that anymore, and
3 significantly they have not brought in
4 an affidavit of someone who did what
5 they did.
6 THE COURT: This portion, is this
7 portion-- this was a portion of Oregon
8 Road that was closed, is that correct?
9 MR. BENOWICH: Yes.
10 MR. DONNELLAN: A portion of
11 Oregon Road, your Honor, that's been a
12 road for a hundred years, right. At
13 some point in time the Town of North
14 Castle made it a public highway, became
15 a public highway because of use, not
16 because of non-use.
17 THE COURT: Was it paved?
18 MR. BENOWICH: Never.
19 MR. DONNELLAN: It's like stone
20 and dirt. I haven't walked all the way
21 up. Maybe you guys know more, but it's
22 more than a pathway. You can look at
23 it from Google Earth and you can see
24 it's a road.
25 MR. BENOWICH: There is no

macadam.

THE COURT: There is a question that keeps bouncing around our training seminars whether or not we are allowed to use--

MR. DONNELLAN: Google Earth.

THE COURT: Some judges opine it's an improper ex parte communication, I am not sure who with.

MR. BENOWICH: After you sign the TRO, we can all go up and look at the road.

THE COURT: If we can use Lexus and West Law, I don't know why we can't do that research. If we look at the photos, it might be problematic and I can go on with that, with your permission I will do that. I won't use it to render any decision or any pictures I see on the Internet unless they are admitted into evidence in some proceeding, but I guess that's the ultimate concern with the ethics of that which is to rely on something that

2 is not in evidence versus legal
3 research, but with your permission, if
4 I can pull it up, I will do that. Any
5 objection to that?

6 MR. BENOWICH: No objection, your
7 Honor.

8 THE COURT: So this was at some
9 point at least improved but not paved.

10 MR. BENOWICH: Not improved.

11 THE COURT: Not even with the
12 stones?

13 MR. BENOWICH: It was flattened
14 out by use, with people walking on it
15 just as if when people walk from a
16 house to the beach, it becomes somewhat
17 distinct.

18 This has not been paved. It was
19 not prepared for vehicular use, and it
20 has simply been used and that's the
21 appearance it has.

22 MR. DONNELLAN: Your Honor, on the
23 survey that we have submitted, it's the
24 last Exhibit E in our papers, there is
25 a macadam drive, a paved driveway. It

2 goes up to the Town of Bedford. I will
3 pull that out.
4 MR. BENOWICH: That, your Honor,
5 ends at the dirt road that is Oregon
6 Road which is what we are talking
7 about. His survey does not identify
8 Oregon Road as a macadam road.
9 THE COURT: I hate doing this
10 because I can never fold them again.
11 MR. BENOWICH: I am sure they will
12 get you another one.
13 MR. DONNELLAN: Your Honor, in the
14 bottom left-hand survey you will see
15 Oregon Road.
16 THE COURT: Okay.
17 MR. DONNELLAN: That's coming from
18 what still is the paved portion, public
19 portion of Oregon Road which goes down
20 to the south, and then you have the
21 disputed portion of Oregon Road and it
22 comes up to where you see a driveway.
23 That driveway winds up, and although
24 you can't see it from this where it
25 says sheet one up on top, Town of

2 Bedford, that driveway winds around and
3 comes to the mansion, the residence
4 that is up in the right-hand corner.
5 THE COURT: Okay.
6 MR. DONNELLAN: So that driveway
7 is paved and comes down to the dirt
8 road, Oregon Road, but that road has
9 been used in the past, right, for
10 vehicular traffic, and that's the
11 reason why the road is shaped the way
12 that it is, if you look at it, because
13 you can see tire tracks over time make
14 a mound in the center of the road and I
15 have seen that on that road.
16 I don't know when that has
17 happened. It's obviously over a long
18 period of time, but the fact whether it
19 was used 10 years ago, 20 years ago, 90
20 years ago doesn't really matter. No
21 one, neither the Town nor the Nature
22 Conservancy, whatever their good
23 purposes are, don't have the right to
24 take private rights away from another
25 property owner, and their allegations

of non-use or adverse possession, that is their burden of proof, they would have --

MR. BENOWICH: Your Honor--

MR. DONNELLAN: I don't interrupt you, please don't interrupt me.

They would have the burden of proof approving that, and the other point --

THE COURT: Who owns Macadam Drive?

MR. DONNELLAN: Seven Springs. That goes up to an existing residence.

THE COURT: Is that the only purpose, is that the only place that road goes to that residence? Obviously it goes everywhere in between.

MR. DONNELLAN: It's a big piece of property. Currently there may be another building on that site, but it's related to that site.

THE COURT: All Seven Springs?

MR. DONNELLAN: All Seven Springs.

THE COURT: No owner of the

2 property up on Macadam benefits from
3 the use.
4 MR. KIRKPATRICK: I believe that's
5 correct. It also connects from the
6 road coming from the north.
7 MR. BENOWICH: That road leads to
8 the northern access of Mr. Donnellan's
9 parcel. What they are suggesting, in
10 an emergency they need the road to the
11 south. They don't. They have access
12 to the north.
13 This is not an easement by
14 necessity. The other thing is--
15 THE COURT: What kind of
16 emergency?
17 MR. BENOWICH: I don't know.
18 THE COURT: In a real emergency
19 they can drive right over that fence
20 and right through fence.
21 MR. BENOWICH: What he is claiming
22 now is, he has a private right in
23 common with other people, and we don't
24 know who they are, and he wants to put
25 in a roadway to the detriment of the

1
2 current use that has been there
3 historically.
4 In addition, it's very important,
5 and it's his burden to show that this
6 Oregon Road was used as a public
7 highway in 1973 when the foundation
8 gave it to Yale.
9 MR. DONNELLAN: No.
10 MR. BENOWICH: You can say no and
11 don't interrupt me while I am talking,
12 Mr. Donnellan.
13 The Appellate Division said when
14 he stated his claim, that is part of
15 the claim he has got because he has to
16 show this is being used as a public
17 road when the '73 deed was conveyed.
18 That is how they stated his claim.
19 THE COURT: A public road, or that
20 he had the private easement when the
21 property was --
22 MR. BENOWICH: If you look on what
23 I think is my Exhibit 3 --
24 THE COURT: Yes.
25 MR. BENOWICH: -- okay, in the

2 middle paragraph, "Contrary to the
3 respondents --"
4 THE COURT: Page one or two or
5 three of three?
6 MR. BENOWICH: Page three of
7 three, the last page of the decision
8 that we gave you.
9 THE COURT: "Contrary to
10 respondents contention."
11 MR. BENOWICH: The plaintiff
12 stated a cause of action based on an
13 implied easement.
14 THE COURT: Implied private
15 easement.
16 MR. BENOWICH: When the foundation
17 conveyed to its predecessor in interest
18 a parcel bounded by a road and used at
19 the time as a public highway. That is
20 an element of the claim as they
21 articulated the claim which they say is
22 a potentially triable claim, so he has
23 to prove that.
24 THE COURT: Let me just, so I
25 understand this because it's going to

be important in the papers I am sure that will be filed with me, the Appellate Division makes that existence of the public highway an element of the implied private easement.

MR. BENOWICH: I think it has to be, because the case law from the Court of Appeals down says when you are determining-- when your claim is an easement is implied because the deed demarcates the metes and bounds by reference to an existing road, it's got to be an existing highway, it's an existing road. That is what all the cases say from Tarolli on down. That's what they said here. That is what Glennon against Mayo said.

THE COURT: I just want to note to go on in that same paragraph, the Appellate Division says, "The abandonment of a public highway pursuant to Highway Law Section 205 does not serve to extinguish private easement."

2 So to me, and this can be disputed
3 at some point, I am not making a ruling
4 at this time, but as I read that as I
5 sit here, it seems that it's a foregone
6 conclusion that there was an
7 abandonment, but nonetheless the
8 Appellate Division has said it does not
9 extinguish the private easement.
10 Now, if that reading is incorrect,
11 I am sure again we will see it in
12 papers and argue it again at some
13 point, but to see what the Appellate
14 Division did here, the abandonment of
15 the public highway isn't what they
16 focused on given that it doesn't serve
17 to extinguish private easements, and it
18 seems they are saying that the
19 plaintiff's predecessor in interest, a
20 parcel of land bounded by a road owned
21 by the foundation, and the foundation
22 again would have been the predecessor
23 to Seven Springs.
24 MR. DONNELLAN: Are both
25 predecessor in title.

2 MR. BENOWICH: We don't concede
3 that. There are several parties in
4 between the foundation and their
5 clients acquisition of his parcel, and
6 there are several parcels that an
7 intermediate title holder acquired
8 which is significant for an easement,
9 your Honor, because any easement that
10 they had, even if your Honor determines
11 it, can't benefit an after acquired
12 parcel, so there is real issues here
13 even if they have what they claim to
14 have, whether it's really enforceable,
15 your Honor focused on the key issue
16 when your Honor first started, and that
17 is, why do they have to do what they've
18 done, and why do they have to continue
19 given their claim is but a claim and
20 not a determined right?
21 They say in their papers that
22 whatever they have done they don't have
23 any plans to do anymore, so it seems to
24 me the safest bet, I don't mean to make
25 this a bet, the safest course, frankly,

your Honor, is to grant our request to maintain the status quo, keep things where they are.

They can't do any more work. They want to enjoy the nature preserve as hikers, fine, don't bring in any back hoes, don't bring in any heavy equipment, don't bring guys in who will pull up the vegetation and throw it into the wetlands down the road which is what happened. Leave the status quo.

Let your Honor get your arms around this case and we can move forward, but this was an exercise of self help which is frankly, your Honor, we think impermissible.

They have acted as if they have the very rights they asked you to declare, and that is not something that New York Law allows.

MR. DONNELLAN: Your Honor, there is also a procedural issue.

THE COURT: Given that this is

2 only six pages, I just want to take the
3 opportunity to read it now.
4 MR. DONNELLAN: Go ahead.
5 THE COURT: Okay.
6 (Short pause.)
7 THE COURT: Does the history of
8 the case to date, the Appellate
9 Division's decision in any way alter
10 the nature of the complaint or require
11 it to be amended in any respect?
12 MR. DONNELLAN: We are considering
13 an amendment to the complaint. I don't
14 know if it's because of the Appellate
15 Division decision in any way, no.
16 THE COURT: One of the things you
17 raise in your papers in Paragraph
18 Three, "The application should be
19 denied because there is no action
20 pending."
21 MR. DONNELLAN: Yes.
22 THE COURT: You want to elaborate
23 on that for the record?
24 MR. DONNELLAN: Yes, your Honor.
25 They have asked for a temporary

2 restraining order and a preliminary
3 injunction, yet there is no action,
4 there is no cause of action for any
5 injunctive relief pending in this case.
6 It is jurisdictionally defective to the
7 application.
8 MR. BENOWICH: Your Honor, the
9 argument is wrong. The cases cited by
10 Mr. Donnellan's brief refer to motions
11 that were made when an action was not
12 pending.
13 In this case, there is an action
14 pending. The plaintiff brought it. We
15 are, perhaps, in the unusual
16 circumstance of a defendant asking the
17 Court to stop a plaintiff from doing
18 what the Court has not yet said he may
19 do because you have the unusual
20 situation of a plaintiff arrogating to
21 himself the power to do what he has not
22 yet declared that he has the right to
23 do.
24 THE COURT: I am somewhat
25 confused, and again forgive me. If the

action in the first instance was to come to court and to have the Court decide what right, if any, you have with respect to the property, vis-a-vis your client and anybody who may claim a right to that property, then wouldn't one expect that the plaintiff wouldn't act beyond the time the complaint is filed as if the property their's and wait to get an answer from the Court?

I mean, I am not quite understanding why there is an action in the first instance that says we believe wholeheartedly we have a right to this property, but we do want a declaration from the Court that we have an easement to this property.

There has to be some doubt in somebody's mind, or at least the idea that other people are going to contest the ownership or you wouldn't be coming to court.

Folks every day pave their own driveways, cut trees down on their

property if they know it's their property without seeking a declaratory judgment from the Court, so to ask for this declaratory judgment and to then proceed onto the property, I guess you could withdraw the action, you can withdraw the request for the declaratory judgment, then you don't have to start an action to stop it.

MR. DONNELLAN: My client did go on the property before. The survey that is in front of us obviously was prepared by his own surveyors being on that property.

THE COURT: Well, there is a difference of being on it and using it daily as a roadway.

MR. DONNELLAN: Not using it as a roadway. The road, we surveyed it, the road engineering studies were done. There is an FEIS like this in the Town of Bedford that includes this piece of property, all right.

It was only when the lead

2 agencies, North Castle and Bedford,
3 were taking the position that because
4 of the Nature Conservancy, another
5 title owner is disputing your right to
6 the road.
7 We couldn't get a project approved
8 because of that, so therefore we have
9 to start the lawsuit at that point and
10 that is what precipitated the lawsuit
11 because we couldn't get approvals done
12 for the property because two
13 municipalities were saying your
14 neighboring property owner is saying
15 you don't own the property, and even
16 the Town, you know, who erected a gate
17 on private property, all right, has
18 been, you know, as I understand it even
19 the lock has been changed. The Town
20 has gone back and locked it again on
21 private property, right, so the Town
22 has been going out of their way to
23 block it as well. That is a whole
24 other story.
25 It's private property. It is a

2 road that was used for a hundred years.
3 Non-use alone doesn't mean abandonment,
4 and that would be their burden of proof
5 anyway.
6 The road has been used. The fact
7 that several years go by, whether it's
8 five, three, two, ten, that it's not
9 used, doesn't mean anything. It's
10 still a road. It's still a private
11 easement, and the Appellate Division in
12 their decision and in another paragraph
13 made, did make a finding earlier on,
14 said Oregon Road apparently became a
15 town highway at some point in time by
16 virtue of having been used by the
17 public as a highway for a period of 10
18 years. It cites the highway law.
19 THE COURT: Is that disputed at
20 some point, that at one point it was a
21 town highway?
22 MR. BENOWICH: No, at one point it
23 was, we just don't know what that one
24 point is.
25 Your Honor, Mr. Donnellan is

2 acting as if he and his client are
3 shocked that we raised an objection
4 before he started the lawsuit or made
5 the motion.
6 The problem is, this is, if not an
7 estoppel, it's an about face by him and
8 his client. As we point out in our
9 papers, their engineers said that we,
10 the Nature Conservancy, fully own the
11 entire roadbed, and that Seven Springs
12 has no rights to utilize any portion of
13 this roadway.
14 If that's the situation that
15 existed in 1998 when they filed those
16 papers, nothing changed before they
17 filed this action in 2006, so the
18 question isn't why is he shocked, the
19 question is, why aren't we all shocked,
20 including the Court, that having filed
21 those papers with various towns saying
22 we don't have any rights to that Oregon
23 Road so we have to do it a different
24 way when they had a different proposal,
25 a different project in mind for the

2 property, now they come around with a
3 different title company and a different
4 set of lawyers and they say oh no, our
5 engineers were wrong when we told the
6 Town that Seven Springs has no rights
7 over Oregon Road that is owned by the
8 Nature Conservancy. Now we have them
9 and we are going to go to Court and get
10 it declared, and we are not going to
11 wait for the Court to declare it, we
12 are going to act as if we have an
13 easement that our people have told the
14 towns we don't have it.
15 THE COURT: The last part is what
16 is troubling to me. All of it they
17 have a right to do. They get new
18 lawyers, a new surveyor, they believe
19 they have rights that they didn't have
20 before, but the part that is troubling
21 is to say we want the Court to make a
22 decision here, but we are not going to
23 wait for the Court's decision. We are
24 going to move on to the property, cut
25 the lock off the gate, and at this

point use it as if we have been using it all along, and that may ultimately be what the Court's decision is, I don't know, but why change the status quo at this point when you have come to court to asked ask for that relief?

MR. DONNELLAN: That relief is just confirming what we already have. We have a road -- I don't understand why it's so funny, your Honor.

MR. BENOWICH: It assumes--

MR. DONNELLAN: Excuse me, excuse me.

THE COURT: Counsel, please direct any questions or comments to the Court, but as I said before, if you withdrew this cause of action and cut the lock off the gate and began to use the property, then they have to come back here and commence their own action to cease that, so either way we get back here.

MR. DONNELLAN: But, your Honor, someone would need to get an

2 injunction. In this case they are
3 looking for the injunction.
4 They need to have the burden of
5 proof with respect to that which
6 includes a likelihood of success on the
7 merits. They are not going to be able
8 to do that.
9 Based on the Appellate Division
10 decision and based upon the chain of
11 title that was reviewed by the
12 Appellate Division, the Appellate
13 Division's statements, including the
14 statement that the rest of their
15 arguments are without merit, believe
16 me, it was fully briefed and fully
17 argued, all right, and all of these
18 things were discussed, all right, so
19 our claim is based on a chain of title.
20 Those facts aren't going to change.
21 All the deeds referred to Oregon
22 Road. Their deed does as well.
23 THE COURT: I don't know what the
24 remaining contentions are, but even if
25 there is one issue, and that is whether

2 or not there is a private easement,
3 that is still the issue that has to be
4 resolved.
5 The remaining contentions, you
6 know, I have to see the appellate
7 papers.
8 MR. DONNELLAN: I understand, your
9 Honor. My argument is that the private
10 easement is based upon a simple chain
11 of title, the deeds. It's based upon
12 the reference in a deed to a public
13 road.
14 THE COURT: Which deed has the
15 reference to the public road?
16 MR. DONNELLAN: All of them, all
17 of the deeds. Our deeds and their
18 deeds make reference to Oregon Road.
19 It's been there for a hundred years.
20 All our deeds make reference to it.
21 They have rights over Oregon Road
22 and so do we, and they are trying to
23 cut our rights off and they have to
24 prove a likelihood of success on the
25 merits to get a court to stop us from

2 going on our property, and I don't
3 think that they have -- that they can
4 prove that, your Honor.
5 MR. BENOWICH: Your Honor --
6 THE COURT: Just give me one
7 second, if you would.
8 Assuming for the moment the
9 abandonment of the public highway or
10 the Appellate Division upheld Judge
11 LaCava's decision with respect to the
12 idea that the public highway was
13 abandoned and the public road was
14 closed, how does the idea that it's
15 referenced in the deed as a boundary
16 create the private easement?
17 In other words, if it's referred
18 to as a public road and the status as a
19 public road changes, how does that
20 create --
21 MR. BENOWICH: First of all, the
22 deeds don't identify it as a public
23 road, it just says Oregon Road, doesn't
24 characterize the nature of the piece.
25 MR. DONNELLAN: It's the Holloway

2 decision, your Honor, and other
3 decisions that have found that a
4 description in a deed to your property
5 that is bounded by a way, a roadway,
6 okay, creates a private right of
7 easement over that roadway, so that's
8 the law, and our deeds do precisely
9 that.

10 MR. BENOWICH: Your Honor, the
11 Holloway case is in the Appellate
12 Division. That is not the only case,
13 the Tarolli case decided 60 or more
14 years later by the Court of Appeals
15 said, and we have it in our memorandum
16 to your Honor on this motion, that
17 whether or not there is an intention to
18 grant an implied easement simply by the
19 fact that there is a reference in a
20 deed to a roadway, is a question of
21 fact to be determined by reference to
22 all the circumstances at that time.

23 You don't simply -- Mr. Donnellan
24 may intend to rest his entire case on
25 the chain of title in the contention of

2 the deeds, but the fact is, in 1973,
3 the Meyer Foundation granted two
4 hundred some acres to the Nature
5 Conservancy for use as a nature
6 preserve.
7 There is nothing in the deed to
8 the Nature Conservancy that suggests it
9 is burdened by an easement in favor of
10 the owner of the other parcel that had
11 been owned by Mr. Meyer.
12 What happened over the hundred or
13 the many years that Meyer assembled
14 this parcel, is that he did come to own
15 all of the land on either side an under
16 Oregon Road. That is a merger.
17 At that time he owned the fee, he
18 owned the dominant and the servient
19 estate. They claim that in 1973, when
20 these two parcels were cut up, one
21 given to Yale, one given to the nature
22 preserve, neither of them sold, neither
23 were sold to some guy to develop, they
24 were given as grants to two charitable
25 or educational organizations. That is

2 significant and distinct from every
3 case they ever cited in their brief.
4 This was not sold so that the
5 Nature Conservancy would make, you
6 know, a hundred five acre little parks
7 or Yale would sell it to a developer.
8 The fact that he later did --
9 THE COURT: Let me ask you is
10 this. Is there anything -- I found it
11 a bit odd that it would be, the
12 property would be left to Yale, and
13 within three months they would sell it
14 for a profit.
15 MR. BENOWICH: Yale didn't sell it
16 for a profit. What happened, in
17 January, at the time of the conveyance,
18 they intended to convey to Yale and the
19 Conservancy. As I understand it, they
20 were doing surveys so they can get all
21 the maps done and the maps right. Yale
22 got it in January of 1973.
23 THE COURT: Sold it in March.
24 MR. BENOWICH: Yale gave it back
25 at some point, not to the foundation

that was winding up, but to something called Seven Springs Farms Inc. Seven Springs Farms Inc. held it from, I think, 1973 to 1984.

THE COURT: What do you mean by when you say, "gave it back?"

MR. BENOWICH: Yale said we don't want it.

THE COURT: They didn't give it back to the original grantor of the land, they gave it to somebody else.

MR. BENOWICH: That's right.

THE COURT: Who had a commercial interest.

MR. BENOWICH: No. Seven Springs was related to the foundation but was not the foundation.

THE COURT: Was related to the original foundation?

MR. BENOWICH: The Meyer Foundation. The derivation of these titles, your Honor, Eugene Meyer, who was then the publisher of the Washington Post in the middle part of

2 the 20th century, moved up and started
3 acquiring all of this land to assemble
4 a summer estate for himself. The
5 mansion was his summer house.
6 When he died, his foundation, that
7 of his and his wife, took the title to
8 all of these parcels. It was one
9 parcel. They then gave 200 some odd
10 acres to Yale for use-- the mansion was
11 to be used as a study center. They
12 gave the rest to the Nature Conservancy
13 for what the Nature Conservancy does,
14 which is to manage nature preserves in
15 their wild habitat.
16 THE COURT: They gave the land on
17 the same side, all of this land here
18 was given?
19 MR. BENOWICH: Loosely speaking,
20 your Honor, the land to the right, most
21 of which or all of which is owned now
22 by Mr. Donnellan's client, was given to
23 Yale. Whatever wasn't given to Yale in
24 January was given to the Nature
25 Conservancy in May.

2 THE COURT: Can somebody come up
3 here and just maybe the two of you can
4 just come up and help me out with this.
5 Just briefly, are we talking about
6 the land being given on both sides of
7 the road?
8 MR. BENOWICH: You see the line
9 here? This line, am I right, Al? This
10 here and across Oregon Road south of
11 the Seven Springs property, this is
12 owned by the Conservancy.
13 MR. DONNELLAN: Not all of it.
14 THE COURT: Just briefly. I want
15 to get some idea.
16 MR. BENOWICH: Your line basically
17 comes here, so they are up to that
18 point. I am not trying to do a survey
19 here, and this is what we are fighting
20 about.
21 This part that my client
22 undoubtedly undisputedly owns the west,
23 the under and the east.
24 THE COURT: This portion being
25 this portion.

MR. BENOWICH: Right about here.

THE COURT: Where is the gate, then?

MR. BENOWICH: The gate is down south under the match line here, so the gate would be like down here.

THE COURT: Off the map.

MR. BENOWICH: That's why it's over this match line.

THE COURT: And everything written off the map, that is not being disputed?

MR. BENOWICH: Part of it is mine. When you walk in from the south, the paved portion of Oregon Road, you hit the gate, then there is a sign that says you are in the Nature Conservancy, you are in the park, and that is about here.

THE COURT: We are still on the record so let's try to keep your voices up.

MR. DONNELLAN: This is the Nature Conservancy property, and this is also

2 the Nature Conservancy.

3 THE COURT: We can go off at this

4 point.

5 (An off the record discussion took

6 place.)

7 THE COURT: We all had a sidebar.

8 I understand now that portion of Oregon

9 Road that is in dispute, I understand

10 that portion of the property that is

11 owned by Seven Springs and by the

12 Nature Conservancy, and the disputed

13 property here is, as was mentioned

14 before, about a hundred yards into the

15 property as was mentioned off the

16 record. That property was acquired

17 after this action commenced, so it

18 seems that the smaller portion, I guess

19 one-tenth of the Oregon Road as

20 displayed on my exhibit, maybe 1-12th,

21 the bottom portion of Oregon Road, but

22 in any event, it is undisputed or is

23 not in dispute at this point that the

24 Nature Conservancy owns that portion of

25 Oregon Road in question, only as to

2 whether or not the original petitioner
3 in this case, and that is Seven
4 Springs, has at this point some kind of
5 easement over that property.
6 Now, you wanted to be heard. You
7 started to say off the record that
8 Seven Springs is just wrong on the law.
9 MR. BENOWICH: Yes, your Honor, I
10 believe they are. I understand the
11 Holloway case and all the other cases
12 they rely on, and without inviting your
13 Honor to read a hundred years of the
14 law on how you create an implied
15 easement, that's what we are talking
16 about, an implied easement.
17 I think there is no contention in
18 the complaint, and none that I have
19 ever seen in any of the papers, there
20 is an expressed grant of an identified
21 easement.
22 They are claiming that simply by
23 virtue of the fact that the deed refers
24 to Oregon Road, they have the right to
25 go anywhere they want wherever they

2 want on Oregon Road.

3 The law is not that simple. The

4 law is, that you determine the

5 implication of an easement by the

6 intent of the grantor, and the deed is

7 not the only thing you look to.

8 One of the things, Exhibit 1, that

9 we have pointed out in our papers, is

10 what is sometimes called a reverter

11 agreement, which was the agreement

12 between our grantor and the Nature

13 Conservancy which obligated us to

14 maintain this property as a nature

15 preserve in its natural state at all

16 times subject to the possibility of

17 reverter, of having to reconvey, and

18 subject to losing the grant of cash

19 that was given to the Nature

20 Conservancy, a non-profit organization,

21 to help it with the project to keep it

22 as a nature preserve.

23 Since 1973, no one, until February

24 or March of this year, no one has

25 suggested that they have any right to

2 do anything other than be a hiker on
3 that road.
4 As I reported, as I reiterated to
5 your Honor, their own papers submitted
6 to the various towns that were
7 reviewing the prior applications for a
8 golf course said they have no rights to
9 utilize any part of this portion of
10 Oregon Road.
11 They are the ones who have changed
12 the status quo. They came here for
13 your Honor-- I won't belabor the
14 argument, but the point is, there are
15 lots of things that your Honor is going
16 to have to consider to determine
17 whether the intent of this charitable
18 foundation, the Meyer foundation, in
19 giving these two hundred acres to the
20 nature preserve, was to allow the
21 recipient of the Yale parcel, or what
22 is now the Seven Springs parcel, the
23 right to put a road in and to have
24 whatever kind of cars and four wheels
25 or six wheels or Hummers or whatever he

2 wants running up and down with abandon.
3 That is not the intent.
4 I think it's playing from the
5 circumstances. It's not plain from the
6 deeds that they have that right, and
7 it's their burden in this action to
8 prove their right by clear and
9 convincing evidence. I think the
10 circumstances simply prevent them from
11 doing it. The final point I would like
12 to make--
13 THE COURT: Does anybody have a
14 year, I am just looking through the
15 papers, that Holloway was decided? I
16 see you cite this case from 1959, was a
17 Court of Appeals case.
18 MR. BENOWICH: Holloway I think
19 it's the 19th century.
20 THE COURT: It predates the case
21 that you cite by some 30 or 40 years,
22 you say?
23 MR. BENOWICH: I think probably by
24 70 or 80. Holloway is a 1893 case.
25 Tarolli is a 1950 something.

2 MR. DONNELLAN: Your Honor, that
3 was briefed before the Appellate
4 Division, mentioned during the
5 argument, and I seem to remember Judge
6 Spolzino mentioning that a Court of
7 Appeals case making law that long ago
8 must be good law.
9 THE COURT: I am not saying it's
10 not good law unless the Court of
11 Appeals has clarified its position
12 since.
13 I am not saying it's bad law, I am
14 just looking at the quote, and assuming
15 the quote is correct, and at this point
16 I have no reason to assume it's wrong,
17 that's on page five of their
18 memorandum. "Merely bounding premises
19 by a road for purposes of description,
20 like using any other mark or monument,
21 is very different from selling by
22 reference to a map or plat on which the
23 grantor has laid out streets. The
24 controlling authorities say that the
25 claim of an easement solely by

implication usually raises a question of intent to be determined in light of all the circumstances, and that running a boundary along a road is one such circumstance only," and that's quoting to Tarolli, so assuming that quote is correct, then the fact that it's a private road is used to set a boundary is to me, based on that case, dispositive of whether or not the easement is created.

MR. DONNELLAN: That exact argument was in their brief before the Appellate Division, reviewed, fully briefed and fully argued.

MR. BENOWICH: No, your Honor, there is a difference.

MR. DONNELLAN: And the other point is --

THE COURT: I don't see any reference in the Appellate Division in dealing with that case.

Judge Spolzino has to also acknowledge that the Court of Appeals

2 decisions from 1959 are valid as well,
3 and it seems what they addressed was
4 the public highway and the fact that
5 the extinguishment of a public highway
6 doesn't extinguish the right of a
7 private easement, and that on their
8 papers they didn't establish as a
9 matter of law a defense to that, but
10 the whole reason they sent this back is
11 to determine whether or not a private
12 easement exists, and I see no direction
13 from the Appellate Division that
14 Holloway is not applicable, or that the
15 fact that the road is mentioned in the
16 deed is a controlling factor. It may
17 have been briefed but they didn't speak
18 to that at all, the Appellate Division.
19 MR. DONNELLAN: The Appellate
20 Division just made reference to the
21 fact that the remaining arguments are
22 without merit.
23 MR. BENOWICH: No, your Honor.
24 MR. DONNELLAN: Please let me
25 finish.

2 MR. BENOWICH: Absolutely.

3 MR. DONNELLAN: The other valid

4 point is their deed, your Honor, makes

5 reference to the road. The deeds

6 issued at the same time coming out make

7 reference to a road, and the Town-- it

8 had to have been a public highway. Why

9 would the Town close it in 1990?

10 MR. REILLY: Judge, can the Town

11 be heard?

12 THE COURT: Yes.

13 MR. REILLY: The Town has the

14 following -- an hour ago you asked a

15 question and no one answered it, and

16 that was the last exhibit in Mr.

17 Benowich's action, and that was a

18 letter from Mr. Trump's attorneys

19 withdrawing the application in the Town

20 of North Castle, and I will state, and

21 I think it's pivotal to this present

22 TRO application, there is presently

23 pending, in the Town of North Castle,

24 no application whatsoever on behalf of

25 Seven Springs, Mr. Trump or any other

2 entity for the development of that
3 parcel. They withdrew it in the midst
4 of the Appellate Division argument.
5 That's significant, and then Mr.
6 Benowich mentioned, Mr. Donnellan was
7 talking about the very few things that
8 were done by his clients that he
9 acknowledged.
10 Just for the record, the town
11 wetlands inspector has determined that
12 in the process, things were ripped out
13 and put into the wetlands, into the
14 prescribed wetlands in the Town of
15 North Castle on the property of the
16 Nature Conservancy. That was done, I
17 think, over the weekend.
18 The point is, this is going to go
19 on for six days of arguments on all the
20 cases and all the facts that have to
21 come out in the litigation.
22 This was sent back by the
23 Appellate Division to be litigated on
24 the facts before a judge, and all of
25 the talk about what the Appellate

2 Division said, the Appellate Division
3 was very clear. They said there was a
4 cause of action stated for an implied
5 easement. They didn't say there is an
6 implied easement. They said the
7 respondents have not disproven, have
8 not established affirmative defenses of
9 adverse possession or involuntarily
10 abandonment conclusively. Those are
11 issues to be developed during the
12 litigation.
13 All we are asking here is, for a
14 temporary restraining order --
15 THE COURT: I wouldn't say
16 conclusively, they haven't established
17 it as a matter of law, which means
18 there has to be some sort of factual
19 proceeding before they can be
20 established.
21 MR. REILLY: Precisely, your
22 Honor.
23 THE COURT: As a matter of law
24 based upon what is submitted, they
25 haven't been established. That doesn't

2 mean that a factual hearing-- now,

3 again, there is always difficulty with

4 factual hearings because I don't know

5 if there is anybody who can testify as

6 to intent in 1973, or that will be

7 gleaned from documents, so I don't know

8 whether there will be a hearing or

9 submissions in lieu of a hearing, but

10 to me, when they say it hasn't been

11 determined as a matter of law, it means

12 just that, almost akin to a summary

13 judgment motion where there is no

14 question of fact and you are entitled

15 to judgment as a matter of law.

16 Where something isn't established

17 as a matter of law, it presumes there

18 are factual issues that have to be

19 resolved, and in fact, they talk about

20 the factual issue is whether or not

21 there is an implied private easement,

22 but that gets us to the factors that

23 this Court has to look at to determine

24 whether there is a private easement.

25 Now, respondents raise, or

2 petitioners in the Order to Show Cause,
3 the Nature Conservancy, Tarolli as one
4 factor that the Court has to look at in
5 deciding, and certainly Holloway
6 indicates that the public highway, or
7 reference to it at least, I have to
8 read Holloway to see how much of
9 Holloway relies on the fact there is a
10 public highway reference, but to the
11 extent Holloway says reference to
12 public highway creates an implied
13 easement, Tarolli seems to not overrule
14 that but clarifies it and says it's not
15 the only things we are looking at. It
16 certainly can be one of the things we
17 are looking at, and certainly if it's
18 referenced in everybody's papers, it
19 has to be one of the things the Court
20 looks at, but maybe somebody can just
21 address this for me.
22 If a public highway is used as a
23 boundary and no longer becomes a public
24 highway, how does that, or does it not
25 change the make-up of the property? In

2 other words --

3 MR. BENOWICH: That's a great

4 question, and the problem where we

5 think from the plaintiff in this case

6 is several fold, if I can get you back

7 onto Holloway.

8 Holloway says that the

9 extinguishment of the public doesn't

10 affect an extinguishment of a private.

11 It doesn't pretend to say there is one

12 factor and only one factor in

13 determining whether reference to the

14 road gets them where they need to go.

15 THE COURT: Is that where Holloway

16 stops, or does Holloway goes on to

17 discuss what defines the problem?

18 MR. BENOWICH: It doesn't.

19 Holloway involved a map around St.

20 Patrick's Cathedral. It was actually

21 what was distinguished in Tarolli by

22 laying out streets in reference to the

23 existing streets because this guy was

24 going to build that plat map.

25 That is not what we have here, but

2 in any event, the issue, it seems to me
3 is, they have to show all the
4 circumstances, and I don't think they
5 can.
6 If you look down in our brief, as
7 your Honor was reading from Tarolli,
8 the parenthetical reference in the
9 Second Department's 1990 decision in
10 Fennica, and I don't purport to state
11 the whole case, your Honor, the
12 reference to the abandoned street in
13 the plaintiff's deeds was merely
14 descriptive. The language did not
15 imply such an easement, since the lot
16 in question has frontage on another
17 existing public way, and Mr. Donnellan
18 today has told you that his client's
19 land has access to the north.
20 The complaint very artfully, and
21 their argument very artfully says, our
22 only way to the south is through the
23 Nature Conservancy, but they have a way
24 to the north, and when the foundation
25 divided these two parcels, they got the

2 north way and we got the southern, and
3 there is nothing other than the mere
4 reference to Oregon Road in metes and
5 bounds that says you shall have a right
6 over us or we have a right over you,
7 because if what Mr. Donnellan is saying
8 that we probably should assert a claim
9 because we are going to want access
10 right back up through his lot that he
11 wants to develop and sell for whatever,
12 we want the same access.
13 So the whole argument is, to his
14 credit, and to the new title company
15 that they brought in, since their
16 engineers told everybody we got no
17 rights, they claim to have a theory
18 under which they might be able to
19 assert a claim. That is all the
20 Appellate Division said.
21 You have stated a claim. If every
22 claim stated in this court proceeded to
23 judgment in favor of the plaintiff for
24 a declaration, there wouldn't be any
25 litigation.

2 This case is-- he has a very heavy
3 burden of proof and he hasn't met it.
4 All he has come to you with is, I got
5 deeds. He hasn't disputed the work.
6 He hasn't disputed that it's the first
7 time he's done this sort of thing since
8 he owned the property in 1995. They
9 haven't done anything.
10 We are entitled to discovery. We
11 served discovery demands. We want to
12 know if what Mr. Donnellan is saying is
13 that he has no evidence other than the
14 language in the deeds, let him say that
15 now.
16 MR. DONNELLAN: Your Honor, if I
17 may quote from the Holloway decision.
18 The Court of Appeals stated, when
19 referring to this issue about the
20 granting of the deeds, "The right
21 itself would be inferred from the great
22 principal of construction that every
23 grant and covenant shall be so
24 construed as to secure to the grantee,
25 the benefits intended to be conferred

2 by the grant, and that the grantor
3 shall do nothing to defeat or
4 essentially impair his grant."
5 In this case you have a grant that
6 makes reference to the road and that's
7 what the Holloway decision is talking
8 about. That grant shall be construed.
9 THE COURT: Can you reread that
10 for me? Is that cited somewhere in the
11 papers I have?
12 MR. DONNELLAN: The Holloway
13 decision.
14 MR. WANK: Exhibit 16 to the
15 moving papers, page 26.
16 THE COURT: Whose moving papers?
17 MR. DONNELLAN: To their moving
18 papers.
19 MR. WANK: To their moving papers.
20 The movant attached the opening brief
21 for the Appellate Division, that's
22 Exhibit 16.
23 THE COURT: Okay.
24 MR. WANK: The quote starts on
25 page 25.

2 THE COURT: Okay, give me a moment
3 to read that at the bottom.
4 (Short pause.)
5 THE COURT: In reading that last
6 sentence, the right itself would be
7 inferred from the great principal of
8 construction, that every grant and
9 covenant shall be so construed as to
10 secure to the grantee the benefits
11 intended to be conferred by the grant."
12 Isn't that the heart of it? Isn't
13 that what Tarolli gets to? And we are
14 saying what were the -- getting to the
15 principal of construction, what were
16 the rights that were intended to be
17 conferred by the grant? And that's
18 obviously what the whole proceeding is
19 about, not simply that because the road
20 is mentioned it becomes this private
21 easement, but what is the intent of the
22 grant?
23 We have to look at the
24 construction. Can construction really
25 be viewed in this vacuum without the

2 discovery and the other exhibits we are
3 talking about?
4 MR. DONNELLAN: It's the
5 construction of the document, your
6 Honor. If you go back to the beginning
7 of the quote on page 25, if I could ask
8 your Honor's indulgence, because that's
9 the heart of how it is viewed.
10 THE COURT: Sure.
11 MR. DONNELLAN: It begins, "While
12 the grantor may have retained the
13 soil."
14 THE COURT: And I read from 25 to
15 the end of 26, but it seemed to me, 25,
16 and the beginning of 26 talks about if
17 the implied right is to be found,
18 whether it's implied or expressed, that
19 nothing that is done subsequently with
20 respect to the public street or highway
21 can extinguish that right, but there
22 has to be the implied right in the
23 first instance, and that we get to by
24 this view of construction and the
25 intention of the grantor at the time,

2 again, "Conferred by the grant, and the
3 grantor shall do nothing to defeat or
4 essentially impair his grant."
5 But I think what we end up with
6 is, what we've been talking about how
7 Tarolli-- and I'm going to look at
8 these before I decide anything before
9 you leave today, I will pull both of
10 these and read them, is simply another
11 way to get at the intention of the
12 grantor, and the construction of the
13 grant, but I did read starting with
14 "While the grantor may have retained
15 the fee of the soil in the highway, he
16 has but a naked or baron title, and
17 that in event of the discontinuance of
18 the public highway by act of law, the
19 grantee and his successors in interest
20 nevertheless will still be entitled to
21 the perpetual enjoyment of certain
22 easements which were impliedly granted
23 in relation to the open way lying in
24 front of the lands granted and referred
25 to as their boundary."

2 MR. DONNELLAN: That's exactly
3 what happened, your Honor.
4 THE COURT: It may or may not be.
5 I don't know at this point as a matter
6 of law it can be said. It doesn't say
7 here that the mere reference to the
8 public highway as a marker conveys the
9 implied easement. It says if there is
10 an implied easement, then it shall not
11 be extinguished by the discontinuance
12 of the public highway, but I don't
13 think anybody resolved yet whether
14 there was an implied easement or not by
15 mentioning Oregon Road as a boundary,
16 and that is what Tarolli seems to talk
17 about, and I will pull both of these
18 briefly, but let me ask this, because
19 there has been some discussion about
20 who has what burden.
21 It's been mentioned if you are
22 going to raise the idea of an
23 extinguishment of an easement, that's
24 an affirmative defense to which you
25 have the burden, but in the first

2 instance there has to be a burden on
3 the movant in the declaratory judgment
4 action to ask that the easement be
5 declared an easement by the Court, so
6 why don't you both address that, and
7 also you discuss a -- I want you to
8 discuss what is in your brief as far as
9 the burden of proof here being somewhat
10 less.
11 MR. BENOWICH: On the likelihood
12 of success?
13 THE COURT: Yes.
14 MR. BENOWICH: Absolutely. First,
15 I am sorry, the burden of proof, your
16 Honor, the plaintiff has to prove that
17 he has -- it has the easement it claims
18 to have, and that burden is by clear
19 and convincing evidence.
20 It has to show that it has the
21 implied easement it claims to have
22 gotten however it had gotten it. At
23 that point, assuming it meets its
24 burden, we would then have the same
25 burden by clear and convincing evidence

2 to prove that he lost whatever easement
3 he had by merger, by abandonment, by
4 statute of limitations or adverse
5 possession, that's true, and that's why
6 the Appellate Division at the end of
7 its decision said that despite the
8 evidence we had suggested, it wasn't
9 sufficient as a matter of law to
10 sustain dismissal, notwithstanding
11 their differing view of what Judge
12 LaCava had done, so they must come to
13 the Court first to show by clear and
14 convincing evidence, that they have the
15 implied easement. I don't think they
16 can do it.
17 They certainly don't do it on the
18 existence of the deeds themselves, and
19 we never raised that issue on appeal,
20 Judge.
21 THE COURT: Also, when it talks to
22 the remaining contentions are without
23 merit, certainly without merit means in
24 the context of the motion to dismiss,
25 and I have to read the appellate briefs

2 to see what else is raised, but in the
3 event-- and we talked a lot about what
4 would make this an implied easement or
5 not, let's assume for a moment that I
6 were to find there was an implied
7 easement, we haven't discussed some of
8 the things you would rely on to show
9 that it would be-- I think we are past
10 the TRO stage at this point, so I do
11 have to decide, even though there is a
12 reduced standard with respect to
13 likelihood of success on the merits, I
14 at least want to hear the argument with
15 respect to the merger, or at least the
16 extinguishment by adverse possession,
17 if that is going to be one of the
18 affirmative defenses.
19 MR. BENOWICH: It will be later.
20 If you would like me to present it, I
21 will give you a flavor of what they
22 include.
23 THE COURT: Some of the arguments
24 I think we should hear at this point.
25 MR. BENOWICH: Sure. It's no

2 secret. Some of them were raised.
3 First is the issue of merger. As we
4 pointed out in our brief to your Honor,
5 literally as the case was in the Second
6 Department, I think some days after we
7 argued, the Court of Appeals decided
8 Simone against Heidelberg.
9 That case reversed a decision by
10 the Second Department. In Simone, the
11 Court of Appeals said where the same
12 owner owns all of the rights to a
13 certain land, in this case the land
14 alongside and under Oregon Road, that
15 all the rights, both the dominant and
16 servient rights, merge into that guy's
17 ownership, and the easement, such as it
18 was, which might have come up from
19 prior grants which may have referenced
20 Oregon Road, is extinguished, and what
21 was significant is, that the Court of
22 Appeals said, that in order to
23 reinvigorate or recreate an easement
24 even by reference to a roadway, you
25 have to have basically expressed

2 language.

3 You have to say as my property

4 professor told me in first year

5 property what, she called a no baloney

6 clause, and we really mean it, we

7 really intend to give you a easement

8 over the Nature Conservancy's land, and

9 that is not here.

10 Counsel told you the only thing he

11 relies on is the implication by

12 reference to the rule of construction,

13 so merger is one of them, because by

14 1973, Mr. Meyer owned all the bundle of

15 rights that any of us are talking

16 about.

17 Second is abandonment, because as

18 we articulated the Appellate Division,

19 in 1990 the Town did put the gate up at

20 the southern end of Oregon Road.

21 The certificate by which it

22 achieved that recites that Rockefeller,

23 the then owner of the land they now

24 own, consented to the construction and

25 erection of that gate, so there is a

2 question maybe not resolved as a matter
3 of law, but their predecessor consented
4 to the erection of that gate and the
5 prevention of anybody from going one
6 way or the other on it. That is the
7 second.
8 The third is, they acquired title
9 in 1995. They commenced this action in
10 May of 2006, more than 10 years later.
11 The statute of limitations for an
12 adverse possession for a claimed
13 adverse possession is 10 years.
14 THE COURT: Who is they? Go back
15 for a minute. Who is they that
16 acquired title?
17 MR. BENOWICH: The plaintiff
18 acquired title for the land they now
19 own in December of '95.
20 THE COURT: I thought Seven
21 Springs existed back in '73?
22 MR. BENOWICH: No, no, in 1973 the
23 property was given to Yale, then to
24 Seven Springs Farms unrelated to the
25 plaintiff.

2 THE COURT: Seven Springs Farms
3 and Seven Springs LLC are two
4 completely different entities?
5 MR. BENOWICH: Absolutely
6 different. Seven Springs Farms owned
7 it for a while and then gave it, I
8 think, to Rockefeller University, and
9 it's from Rockefeller that this
10 plaintiff obtained its title, so it's
11 not the same entity that got the land
12 back from Yale, not the same people,
13 not the same purpose, nothing.
14 So they weren't here in 1973.
15 They show up in 1995, at which point
16 the road was closed. Now, whether they
17 had an easement, what effect it is,
18 that was litigated, but he knew, the
19 plaintiff knew in 1995 that there was
20 no way to go up and down Oregon Road
21 through that gate because it was locked
22 and he didn't have a key.
23 For 10 years he not only told
24 North Castle and Bedford we don't have
25 any rights, but he didn't ask for a

2 key. He didn't say I need a key. He
3 didn't say I'd like to tear it down,
4 tear down some vegetation, do you mind
5 if I clear a rock away? Nothing. He
6 didn't even ask us to do it.
7 Plaintiff didn't do that until the
8 Appellate Division's decision came
9 down. Then miraculously this starts
10 after we are here to have this Court
11 determine the rights, and I won't
12 belabor the argument, your Honor got
13 it, but those are several of the
14 affirmative defenses that we have which
15 we think there is substantial evidence
16 of.
17 The Appellate Division said we
18 didn't prove it as a matter of law, but
19 we have got substantial evidence, and
20 the entire predicate of our motion to
21 dismiss and the appeal was even
22 assuming the plaintiff has the easement
23 it claimed, it lost it one of these
24 ways, so we have never litigated the
25 issue of whether they do in fact have a

2 private implied easement.

3 We assume that is the basis for

4 the motion in the appeal and that is

5 why the Appellate Division's

6 determination is limited to saying that

7 whatever the Town did, it didn't close

8 off the private rights.

9 THE COURT: I disagree with the

10 proposition that there is no action

11 here. There is an action. There is an

12 index number, but why not seek the

13 injunction when you answer by not

14 seeking --

15 MR. BENOWICH: There was nothing

16 going on. They weren't doing anything.

17 They were our neighbor. They weren't

18 sending people across the border. They

19 weren't sending people to the border to

20 do what they are doing. It never

21 happened until now.

22 MR. REILLY: We did answer.

23 MR. BENOWICH: No. Your Honor,

24 had they had any idea they were doing

25 anything other than hiking on the land,

which is what it is there for, we wouldn't be here.

THE COURT: Is there any principle of law that says you have to move for an injunction at the time you answer, or from so many days therefrom?

MR. BENOWICH: No. The motion for the injunction--

THE COURT: Was created by their action.

MR. BENOWICH: -- was created by their acts. Otherwise, the rule would be that we have to counterclaim for determination in a declaration, and it's not.

In fact, the law is to the contrary, because your Honor is required not just to non-suit them if they lose, but to declare they do not have the rights they ask for, so the question of who has the rights is very alive in this case, and it wasn't until they began to act as if they had rights that your Honor has not declared,

2 that's when we came to court. We did
3 not wait.
4 THE COURT: And the injunction you
5 would seek, what language in the
6 injunction?
7 MR. BENOWICH: I would ask for
8 what we have in the proposed order, the
9 TRO that we presented. We don't want
10 them coming on and doing any work.
11 They are free to walk like anybody
12 else. It's a nature preserve, but we
13 don't want them pulling any vegetation,
14 moving any stones, pulling twigs,
15 rocks.
16 We don't want to come back to your
17 Honor to determine if it's a twig, a
18 branch or a tree. That is not
19 something for your Honor to determine.
20 They told you they did the work.
21 They told you they have no intention of
22 doing anymore, or so they claim. They
23 have also told you they don't have a
24 permit to do any work.
25 This requested order preserves the

status quo, and that's why the cases we cite from the Second Department say what you are trying to do is to maintain the status quo.

The showing of likelihood of success isn't necessarily as high, and that's why I think we are going to win this case.

I am convinced that Tarolli will convince your Honor that they don't have anything else besides the deeds, and they are going to lose, but that is my argument, but I don't have to prove to a certainty on this, and your Honor knows that the statute was amended to say that even where there is a question of fact, your Honor can grant and ought grant provisional relief to preserve the status quo.

What they are seeking to do is to change it without coming to you, without even coming to us. They didn't come and say look, we have an easement, we want to maintain it. They didn't do

2 it. They sent their guys down.
3 They didn't call the Town and say
4 take your lock off our land. They went
5 in and busted it up and put a new one
6 on. That is not how someone comes to
7 court with clean hands when they asked
8 this Court to declare what rights they
9 have in the first place.
10 THE COURT: Counsel.
11 MR. DONNELLAN: Your Honor, just a
12 couple of points. The Simone case that
13 counsel refers to has no application to
14 the case at all. That refers to a
15 merger, when our claim is to deeds at a
16 later point in time. There was no
17 merger after that in 1973, so that is
18 consistent with the Appellate Division,
19 so the case is totally inapplicable.
20 The Meyers', when they owned all
21 of the properties, was before our chain
22 out, the chain to Yale.
23 THE COURT: So you are not
24 claiming an easement existed prior to
25 the Meyer's ownership.

2 MR. DONNELLAN: It doesn't matter
3 to us whether it did or not. I really
4 don't care.
5 When the Meyers conveyed the
6 property to Yale and they conveyed it
7 back to Seven Springs, all the deeds
8 after that, all the deeds out that
9 ultimately come to us, there is no
10 merger in that chain, and they all
11 refer to highway, they all refer to the
12 road, and that's why the decision from
13 the Appellate Division recites I think
14 the 1973 -- the deed in 1973 to Yale
15 University when the private easement
16 was created, and that's correct and
17 that's consistent with our position.
18 THE COURT: Well, again, I am just
19 factually trying to understand. I
20 would read this as applying to an
21 express or implied easement such that
22 even if it existed when the land comes
23 under common ownership, it no longer
24 exists, but certainly if somebody
25 grants the land going forward could

2 grant the easement, I suppose, so I
3 want to understand whether you are
4 arguing it existed for hundreds of
5 years, or at the very least was created
6 by the Meyers in their subsequent grant
7 and the subsequent deeds down the
8 chain.
9 MR. DONNELLAN: The road has
10 existed for over a hundred years.
11 THE COURT: But not necessarily --
12 MR. DONNELLAN: But, I am not
13 filing the whole chain of title during
14 that period of time, and it may have
15 been a public road during some
16 significant portion of that period of
17 time.
18 THE COURT: Are you arguing there
19 was ever an expressed easement in any
20 of the deeds?
21 MR. DONNELLAN: The reference to a
22 public highway is an expressed easement
23 according to the law, your Honor,
24 that's the Holloway case states that,
25 that is an expressed easement because

it's making reference to a public road and that's in all of the deeds, ours and theirs.

THE COURT: You want to address some of the other points?

MR. DONNELLAN: Yes. Counsel makes an argument about the consent to the gate that our predecessor in title consented to the installation of the gate. That actually kills their defense, you Honor, all right.

In order to have adverse possession, it has to be open and hostile and the claim of right. Cases are cited in our brief on that, the Koudellou Vs. Sakalis 29 AD 3rd 640, Second Department, 2006.

If you consent to it, then it kills their defense, so the fact that their argument that a predecessor in title consent to the installation of the gate, would defeat any claim or defense by them for adverse possession.

The other issue is, that the gate

2 is at the southern portion of the road
3 anyway. If you go back, you remember
4 the survey, there is a driveway that
5 leads from the residence down to the
6 public portion of the road.
7 There has never been a point in
8 time when that access was ever blocked,
9 all right, and counsel made a lot of
10 arguments.
11 THE COURT: Are you talking about
12 Macadam Road now?
13 MR. DONNELLAN: Macadam Road is a
14 driveway on Seven Springs property. It
15 ends at the end of their property but
16 on the road, must have been a reason
17 why that driveway was there for many
18 years, that's the driveway, one of the
19 driveways from the mansion that my
20 client lives in, and that's an
21 important point, your Honor.
22 Counsel is making an argument that
23 engineers, I am not sure who they are,
24 but engineers who supposedly work for
25 Seven Springs made a lot of statements

2 about we have no rights is his
3 argument. I dispute what they said,
4 and even if they did, the man who lives
5 in the residence, Donald Trump is the
6 owner of Seven Springs and he's never
7 said it that. He has no rights as far
8 as I know, and unless counsel can show
9 me some statement to that effect, I
10 have never seen it.
11 THE COURT: Can we go back to the
12 erection of the gate? How would that
13 negate the argument as a matter of law
14 or the adverse possession argument?
15 MR. DONNELLAN: Because in order
16 to have adverse possession, it has to
17 be with open and notorious and with
18 claim of right. So, in other words,
19 the person who installed the gate would
20 have to be doing it claiming they owned
21 it and were exerting dominion and
22 control over blocking that area of the
23 property.
24 THE COURT: That would be the
25 hostile part.

MR. DONNELLAN: The hostile part of it, right, so if the servient, if our predecessor in title consented to it, therefore it wasn't open and hostile, it was with consent.

MR. BENOWICH: Your Honor, that is quibbling, because the argument we made, and the proper way to consider the evidence is, if Rockefeller consented, then they abandoned any claim to using because they didn't have a key to the gate.

If they didn't consent, then we have the hostility that is required for adverse possession, so to look at it on only one leg is really to deprive the evidence of the quality it enjoys in this case because it does support one or the other, either of which is perfectly sufficient to extinguish his claimed easement and --

THE COURT: Adverse possession I understand, not a problem. Abandonment, briefly remind me of the

2 elements that must be shown for the

3 abandonment.

4 MR. BENOWICH: The abandonment is,

5 they gave up any right or claim or

6 ability to pass through that gate where

7 the gate is.

8 THE COURT: For how long? Let's

9 assume for a moment Rockefeller said

10 this is my property and he is correct

11 if he said this is my property and the

12 Town said it's your property, we

13 concede that, but we are going to put

14 up a gate so that nobody else can go

15 over it and I am not going to use that

16 back entrance, it may not be hostile.

17 It may not be -- some of the adverse

18 possession elements might not apply,

19 but as far as abandonment, is this an

20 estoppel argument that you give up the

21 right and for how long do you not use

22 the property until it becomes abandoned

23 by the owner?

24 MR. BENOWICH: Ten years.

25 MR. DONNELLAN: Your Honor--

2 MR. BENOWICH: Excuse me.

3 Rockefeller owned it from '84 to '95.

4 In 1990 the gate went up supposedly,

5 according to the certificate, with

6 Rockefeller's consent.

7 When they bought, when Seven

8 Springs LLC, the plaintiff, bought the

9 property, they are charged with

10 knowledge with what the facts are. The

11 facts included that gate up there with

12 a lock they didn't have and didn't get

13 a key to.

14 For more than ten years

15 thereafter, that lock and gate were

16 there, they never asked for it to be

17 taken down. They never said gee, it's

18 impairing my rights. They said nothing

19 until they filed the lawsuit more than

20 ten years later.

21 Now, I would like to go back, your

22 Honor--

23 THE COURT: I don't know if he was

24 done. I want him to finish addressing

25 the points that you addressed before.

1
2 MR. DONNELLAN: Your Honor,
3 counsel is confusing two issues in a
4 very bad way. The Court of Appeals
5 held in Welsh Vs. Taylor--
6 THE COURT: Where are you reading
7 from?
8 MR. DONNELLAN: Page 39 of Exhibit
9 16.
10 THE COURT: Go ahead.
11 MR. DONNELLAN: Around the middle
12 of the page there, your Honor, it says,
13 "As we noted almost one hundred years
14 ago, abandonment necessarily implies
15 non-user but, non-user does not create
16 abandonment no matter how long it
17 continues. There must be found in the
18 facts and circumstances connected with
19 the non-user, an intention on the part
20 of the owner of the easement to give it
21 up, but intention existing, coupled
22 with non-user, with a finding of
23 abandonment." The ten year issue has
24 nothing to do with abandonment. The
25 ten year issue is a requirement in

2 order for them to establish adverse
3 possession.
4 THE COURT: Adverse possession.
5 MR. DONNELLAN: That has nothing
6 to do with non-use, that has to do with
7 them exerting control over the
8 property. That goes back to what we
9 talked about before, is intention at
10 the time. Certainly at the time
11 Rockefeller allows the gate to be put
12 up, and I would agree the arguments
13 would have to be made in the
14 alternative. Either it's adverse
15 possession, or if he consents, then
16 they have an opportunity to convince me
17 that when Rockefeller consents, even if
18 he doesn't agree -- well, even if it's
19 not a hostile and it's not erected, the
20 gate, with the idea that Rockefeller
21 doesn't own the land, at the time he
22 puts the fence up, his intent was to
23 give up whatever right he may have had
24 over the property, then at some point
25 it can being deemed to be abandoned,

and again it's a question of fact.

*MR. DONNELLAN: * That's their burden of proof, a heavy burden of proof.

THE COURT: Counsel admitted that before. Abandonment, like adverse possession, would be his burden, but in the first instance you would have the burden of demonstrating the implied easement.

MR. DONNELLAN: Yes, your Honor, and there is a good reason for the gate to be there. There is a good reason for the gate to continue to be there, right? It's at the end of the road, right, and the Town had a good reason to put it up to begin with with respect to other people coming onto that property and dumping, you know, garbage and so forth and so forth.

It's unprotected, so having some protection there for our property as well as their's --

THE COURT: I think that goes back

2 to the principle, that even if it was a
3 public road and the public road is
4 closed and extinguished, it wouldn't
5 extinguish any implied easement that
6 you have, so obviously there still
7 would be a reason, but it may or may
8 not be evidence of an intent to abandon
9 the property back in 1984. At this
10 point I don't know.
11 MR. DONNELLAN: And non-use
12 alone -- doesn't matter, it could be a
13 hundred years.
14 THE COURT: I understand that.
15 Non-use, in and of itself, does not
16 create the adverse possession or the
17 abandonment. Again it unfortunately
18 goes back to the intent at the time the
19 gate was erected. I don't know what
20 evidence will be available.
21 MR. DONNELLAN: The other argument
22 I want to respond to, we are talking
23 about the timing. They put their
24 answer in dated March 10th. Their
25 affidavit in support of this

2 application is dated March 11th
3 complaining about things that happened
4 on March 3rd.
5 THE COURT: Whose affidavit?
6 MR. DONNELLAN: Counsel's
7 affidavit.
8 THE COURT: The attorney or the
9 woman who saw the garbage or whatever,
10 the weeds being pulled?
11 MR. DONNELLAN: Counsel's is the
12 13th, Amy Feno is March 11th, and the
13 answer is dated March 10th does not
14 have any -- seeking any relief for
15 injunctive relief.
16 MR. BENOWICH: Your Honor, I
17 thought we resolved this. There is no
18 requirement anywhere that I have to
19 have a cause of action for an
20 injunction, to make a motion for an
21 injunction when the party is disturbing
22 my rights which would render your
23 judgment ineffectual. It is just not
24 the law.
25 The one thing I would like to

2 clarify, though, counsel before when

3 you pressed him said that he is

4 standing on the claim to an express

5 easement. The Appellate Division --

6 THE COURT: I think what he said

7 is reference to the public highway

8 creates the expressed easement.

9 MR. BENOWICH: The Appellate

10 Division-- let's go back to that

11 important sentence, didn't see it that

12 way. They said his claim is one for an

13 implied private easement arriving in

14 January, '73. They don't regard it as

15 an expressed easement.

16 MR. DONNELLAN: It's a play on

17 words. The expression is in the

18 easement with reference to the public

19 road.

20 THE COURT: Again, whether it's

21 expressed or implied I think is

22 something ultimately the Court

23 determines. I really took the

24 statement to mean that any easement

25 that was created, implied or otherwise,

2 was created by the reference to the
3 public highway which seems to leave
4 this -- well, then that position would
5 seem to be one that could have been
6 resolved as a matter of law, not -- if
7 that were simply the question, it seems
8 that could be resolved as a matter of
9 law rather than necessitating any
10 findings of fact.
11 MR. DONNELLAN: Your Honor, I
12 agree, and procedurally, because it was
13 a motion to dismiss as opposed to a
14 motion for summary judgment, the Court
15 was limited.
16 If you read the language it's
17 pretty clear what the Appellate
18 Division is saying in their findings.
19 They could not rule and grant judgment
20 because it's a motion to dismiss, but
21 our intention, obviously, would be to
22 make a motion for summary judgment on
23 this issue because we believe it can be
24 established by the documents that are
25 on the record.

2 We don't need any depositions from
3 Meyers decedents or what they thought
4 about in 1973. I mean, it's silly.
5 You know, it's based upon the
6 construction of the documents, that's
7 what the Court of Appeals was telling
8 us, and that combined with their deeds
9 also referencing a road, right, it's
10 clear from the -- the intention is
11 clear from the construction of the
12 documents itself.
13 MR. BENOWICH: Your Honor, if that
14 were the case, Tarolli wouldn't have
15 gotten to the Court of Appeals. They
16 wouldn't have written an opinion and
17 they couldn't have written what they
18 said.
19 THE COURT: Let's assume for a
20 moment that everybody concedes that's
21 the issue. There is no argument in the
22 alternative that apart from the
23 reference to the public highway, there
24 was an intent to create the implied
25 easement any other way.

2 MR. BENOWICH: I am a little lost
3 at Your Honor's statement. You are in
4 the negative.
5 THE COURT: Counsel is indicating
6 that the only way the easement is
7 created is by reference to the public
8 highway in the deeds, then is there a
9 way that we can deal with that one
10 issue without the discovery?
11 I mean, he is not arguing in the
12 alternative that there was an intention
13 to create an easement.
14 MR. BENOWICH: There absolutely
15 has to be. He is saying the language
16 expresses an intention.
17 THE COURT: He said the language
18 alone, so as a matter of law, if a
19 court were to hold, the Appellate
20 Division were to hold that Tarolli
21 doesn't say that, doesn't say that,
22 reference to a public highway as a
23 matter of law creates an easement, then
24 is there any need to do discovery over
25 the course of the next year?

2 MR. BENOWICH: If the Appellate
3 Division were to say that reference to
4 the highway alone does not create an
5 implied easement, then I think he is
6 non-suited. He doesn't have the rights
7 he claims, but I believe that-- I
8 believe that's what Tarolli requires,
9 that he is not non-suited because you
10 can't just look to the deed.
11 THE COURT: But it seems to me
12 that is the only argument he made so
13 far today, so if that's the only
14 argument, is there a way to brief that
15 issue and deal with it without having
16 to do everything? You don't have to
17 answer that today.
18 MR. BENOWICH: If I understand
19 your Honor's proposal, we would brief
20 sort of an agreed question, that if the
21 evidence that this Court looks to to
22 determine whether he is got an implied
23 easement is limited to the deeds or
24 whether this Court may and should look
25 to something else, if that is the issue

2 and he agrees if he loses that
3 determination that he is non-suited and
4 doesn't have his easement, I will talk
5 to my client and we can come back to
6 you on that, because that narrow
7 question, if he wins that issue he
8 wins. If he loses, he loses the case.
9 THE COURT: Again, I don't
10 necessarily need an answer this moment,
11 but it seems in several instances when
12 I put the question to counsel, it's the
13 reference to the public highway creates
14 the-- express was the language,
15 easement, I will take out the word
16 express and say easement, but if
17 counsel is conceding in that
18 proposition of the law is not correct,
19 then there is no easement, then perhaps
20 we can figure out a way to get that
21 question as a matter of law for me to
22 rule on it, and whoever loses takes the
23 appeal and resolves that one issue
24 rather than go through-- you just said
25 he will make the summary judgment --

2 you just indicated that the summary
3 judgment motion, wherever it's going to
4 be a year or two down the road is going
5 to be on that single issue, and I don't
6 know that we need discovery to resolve
7 that one issue, and I don't know that
8 it wasn't raised in a 3211 motion. I
9 just don't know.

10 If there is a way to expedite that
11 issue getting to the Appellate
12 Division, if that's the only issue that
13 everybody seems to hang their hat on,
14 then why not get the answer sooner than
15 later? But if you would rather go
16 through there was an implied easement,
17 it was extinguished, it was abandoned,
18 certainly you can do that if the
19 Appellate Division says there was
20 easement, to reserve your right to do
21 that, but think about that.

22 I want to pull Tarolli. I know
23 it's getting late but I want to take a
24 look at Tarolli and Holloway myself and
25 then I will be back out. Give me a few

1
2 moments.
3 (Recess.)
4 THE COURT: The portion of Oregon
5 Road that is in dispute, is that
6 referenced in the deeds? You said
7 before that it's described as a marker.
8 If that is wholly within the --
9 MR. DONNELLAN: No, your Honor,
10 that is an important point, actually,
11 that we were just focusing on as well.
12 The portion of Oregon Road that is
13 in dispute, all right, is in the middle
14 of two parcels owned by the Nature
15 Conservancy. Their deed into the
16 Nature Conservancy sets forth two
17 separate and distinct parcels.
18 Both of those parcels are bounded
19 by Oregon Road, so they didn't get
20 one -- they got one conveyance in that
21 it's one deed, but they didn't get one
22 parcel.
23 If Oregon Road was not a road and
24 at that time it was a public road, at
25 that time, which is very important with

2 respect to the Tarolli case which only
3 dealt with a private road, if we are
4 talking about at the time the easement
5 was created was a public road, and at
6 the time they received their
7 conveyance, their two parcels that were
8 conveyed to them were bounded by that
9 public road. Same thing as if it was
10 Main Street.
11 THE COURT: But in any conveyance
12 to your clients, is that section of
13 Oregon Road used as a boundary?
14 MR. DONNELLAN: The northern
15 section of it is, but at the time,
16 because Oregon Road, you remember, in
17 1973, was a public highway, so our
18 parcel, when it was conveyed to us, is
19 bounded by Oregon Road to the north.
20 That boundary gives you a private
21 easement over Oregon Road to the south,
22 and when --
23 THE COURT: Is north this way on
24 this map?
25 MR. BENOWICH: North is to the top

2 of the map.

3 MR. DONNELLAN: It's right there,

4 though, if I may come up and approach.

5 THE COURT: Sure.

6 MR. DONNELLAN: Again, this

7 portion of the map shows Oregon Road

8 bounded, so our deed starting at the

9 point where we have our finger conveys

10 this portion of the property to Seven

11 Springs, their predecessor.

12 THE COURT: That is not being

13 disputed, correct?

14 MR. BENOWICH: Exactly.

15 MR. DONNELLAN: It was conveyed.

16 It was conveyed as bound to Oregon

17 Road, Oregon Road being a public

18 highway.

19 Once you have that boundary on

20 Oregon Road, you have the right to go

21 to other portions of the public road to

22 the north and to the south.

23 If you buy a piece of property on

24 Main Street and it says it's bounded by

25 Main Street, it means you have a right

2 to Main Street in front of your
3 property and you have a right to go in
4 either direction, and they had the same
5 right.
6 When they got their deed they got
7 a deed for this side, and the deed had
8 a description to this side.
9 THE COURT: Now it becomes
10 relevant that you have an ownership in
11 half of this road here.
12 MR. DONNELLAN: Yes.
13 THE COURT: So you can cross over
14 this land to get to it.
15 MR. DONNELLAN: Yes.
16 THE COURT: It's kind of a
17 different argument then, because the
18 cases that discuss this easement seem
19 to talk about the other side of the
20 road, and the grantor owning the right
21 to the road, at least that's what
22 Holloway talked about.
23 The grantor, when he gives the
24 property preserves for himself,
25 actually it was presumed against the

grantor that he was preserving for himself that property, and the easement was said to go to the grantee so that the grantor wouldn't get the benefit of keeping that land for himself.

MR. DONNELLAN: He owns the naked title.

THE COURT: That's where that expression came from, that he owns the naked title, but it didn't involve cases where different principals now, in order to utilize the land that you clearly own, you have to pass over the land that arguably somebody else owns. That might be a different way to argue there is an easement.

MR. DONNELLAN: No, the easement is over the road all the way to the public portion of the road.

THE COURT: But because of the fact that you own half of this road and it would render the ownership useless if you didn't have the easement--

MR. DONNELLAN: No.

1
2 THE COURT: -- not so much that it
3 was granted, you don't own on either
4 side of this road, correct?
5 MR. WANK: This was actually
6 briefed in the Appellate Division also.
7 MR. BENOWICH: It wasn't decided.
8 THE COURT: Let's go back.
9 MR. WANK: So the case law says
10 when a grantor owning the fee to a
11 street sells property bounding on the
12 street, the--
13 MR. BENOWICH: Your Honor, this is
14 not a quotation, he is reading from his
15 brief as if it's authority.
16 THE COURT: Let him make the
17 argument and that will be put on the
18 record.
19 MR. WANK: He is asking the
20 question.
21 THE COURT: To me, please.
22 MR. WANK: When a grantor owning
23 the fee to a street sells property
24 bounding on the street, the deed
25 creates easements over the street to

2 its full width in favor of the grantee
3 and his or her successors, that is in
4 re 31st Avenue 273 NYS 757.
5 THE COURT: But that's --
6 MR. WANK: Wait, I am sorry, your
7 Honor. Then in the second case where a
8 deed describing land as bounded by a
9 way, indicates that the way extends
10 beyond the land conveyed, or there has
11 been some other indication of the
12 extent of the way, in this case Oregon
13 Road, the grantee acquires a right to
14 use the way not merely in front of his
15 or her property, but to the full extent
16 of the way as indicated. That's in re
17 Sedgwick, 213 New York 438, so as you
18 were discussing before, you have the
19 right to use the full length of the
20 easement, and in this case the public
21 road because it was a public road prior
22 to 1973 and after 1973.
23 MR. BENOWICH: Your Honor,
24 counsel's argument assumes the question
25 you have to decide, and that is if what

2 was intended. There is no flat rule of
3 law that says the references in these
4 deeds mean ipso facto, without defense,
5 other than by extinguishment, that they
6 have an easement. It doesn't mean
7 that. Trolley makes plain that is not
8 what they can mean.
9 Whatever the question, it is what
10 was the intention of the grantor of
11 these deeds, and you can look just to
12 the deed. You don't. You look to the
13 circumstance, notwithstanding counsel's
14 elegant reference to his own brief.
15 MR. DONNELLAN: I will agree with
16 counsel's initial statement that the
17 argument assumes that we have the
18 easement, but once you have the
19 easement, I believe counsel concedes
20 that that easement goes in both
21 directions. I don't believe that is
22 really in dispute, but we would have to
23 establish the easement.
24 Once you have it, then you have
25 it, and Tarolli, the Tarolli case is

really distinguishable. The Tarolli case dealt with a private road, not a public road, all right, so the Court dealt with that issue and distinguished this is not the same thing.

For instance, they compared it to a subdivision map, if someone has laid out streets like in a subdivision where the streets would become public roads.

In our case we already had a public road and that's why the Holloway case dealt with it and dealt with a public highway, not a private road. The Tarolli case only dealt with a private road, and the Court couldn't get over the intention of the parties that the private road somehow gave some rights. It was very much different.

In our case it was already a public street. You don't need to refer to a subdivision map. It's already on the Town's tax map as being a public highway.

THE COURT: I think, well, if I

2 didn't ask this, maybe this would have
3 obviated the need for all of this. I
4 assume there is no consent, there is no
5 agreement on a stay at this point, or
6 am I wrong in assuming that you will
7 consent to some kind of stay,
8 restraining order being granted?
9 MR. DONNELLAN: I can't consent to
10 a stay. I think it puts-- it taints
11 the property further than it already
12 has, all right.
13 We have our rights with respect to
14 the road. Our rights with respect to
15 that road are granted limited, all
16 right, and we certainly can't do things
17 that would require permits.
18 Could we apply for a permit? You
19 know, that requires subdivision
20 approval and a long process that hasn't
21 even started. I believe we can do
22 that, but you can't go in there and cut
23 down trees or a paper road or do
24 anything, but I think we do have the
25 right to maintain it if there are weeds

2 or a log falls on the road, we have a
3 right to pick the log up and move it
4 out of the way.
5 I believe we have the right, as we
6 have done in the past, to bring a
7 vehicle from the north from the Seven
8 Springs property down to the bottom,
9 and that may be done for planning
10 purposes or whatever, and I believe we
11 do have the right to do that. It's not
12 destroying the property in any way.
13 It's really using the road as it has
14 been used for 100 years.
15 THE COURT: Now, you would ask
16 that if I issue a restraining order or
17 injunction at this time, that they be
18 enjoined from even passing over that
19 portion of the road?
20 MR. BENOWICH: No, your Honor, we
21 didn't say that.
22 THE COURT: Except in the manner
23 of a hiker or anything else. As far as
24 bringing in any trucks in or any cars,
25 you would have me enjoin the use of

that parcel in its entirety?

MR. BENOWICH: That's right.

MR. DONNELLAN: I agree that our argument is limited for ingress, egress and main the road for that purpose alone, not improving it, and I certainly think we have the right to drive a vehicle on it, all right, as that has been done in the past. Why should that change?

THE COURT: The question is when in the past, and the problem that I have is to read both Holloway and Tarolli. I can't necessarily find as a matter of law, I concede it's in Tarolli, that Tarolli talks about a private road.

Now, I haven't given enough thought given that this was something that was brought up as I returned to the courtroom, whether or not that makes a difference.

I will read from Tarolli, however, the following: In Tarolli, "There was

2 strong evidentiary support for the
3 affirmed finding of fact that the
4 parties, in the 1954 transaction, did
5 not intend that the vendee should
6 acquire thereby a right-of-way easement
7 as to the private road or lane in
8 dispute. We therefore deal with the
9 assertion of those vendees that as a
10 matter of law, such an easement was
11 implied."
12 In Tarolli the Court held that
13 this language of description did not
14 require the implication of such an
15 easement as a matter of law.
16 Now, the problem is, in order to
17 distinguish Tarolli from this case we
18 have to get to factual assertions, and
19 I am not going to reread the quote,
20 merely bounding premises by a road, et
21 cetera, that is in their brief, doesn't
22 create the easement.
23 When we go back to the intent, in
24 that case the Court of Appeals had the
25 luxury of affirming the findings of

2 fact of the Appellate Division and then
3 making it whole as a matter of law.
4 If this were a private road, then
5 there wouldn't be any distinction. I
6 don't know that there is-- ultimately
7 will or will not be, but Tarolli
8 clearly says that the description,
9 merely using the road as a description
10 does not require the implication of an
11 easement as a matter of law.
12 Now it remains to be seen whether
13 or not the private road, public road
14 distinction is valid, but even going
15 back to Holloway, there is, I concede
16 Holloway is a rather difficult opinion
17 to read.
18 MR. BENOWICH: We didn't intend
19 it.
20 THE COURT: Reading it in 20
21 minutes having been written in 1993, my
22 page five is cited as 139 New York 390
23 is the original cite, it would be at
24 1050 407, actually, of the 139 New York
25 407 or 34 Northeast at 150.

1
2 The Court notes, "That at the time
3 of the sale of the land to Clarkson,
4 the open way by which the grantor
5 bounded it, existed as the visible
6 incident to the enjoyment of the land."
7 Now, why is that important?
8 Again, in my brief reading of Holloway,
9 it seems to be a case that relies on
10 facts, facts not yet established here,
11 but that again, the intent in Holloway
12 was to grant an easement or at least a
13 viable way to use the property, and
14 this sentence I think is important, is
15 that it existed, what became the
16 easement, as the visible incident to
17 the enjoyment of the land.
18 The Holloway court goes on to try
19 to reconcile many, many years of
20 different opinions on this issue, and
21 it's not clear as a matter of law to me
22 in reading Holloway, that the Court
23 said as a matter of law where a roadway
24 is used as a boundary, as a
25 description, that in and of itself

2 creates an easement over that boundary,
3 and again, what was discussed in
4 Holloway was the idea that the grantor
5 of the property couldn't, by use of the
6 reference to the public highway, when
7 the public highway was extinguished,
8 get a right back that he had given to
9 the grantee.

10 Now, I know that the easement, if
11 it was created by the grantor, is
12 binding upon his heirs, et cetera, but
13 again it's somewhat different because
14 the line of cases that Holloway follows
15 seems to be as against the original
16 grantor, and those who subsequently
17 take the property, and then the
18 grantor, who is still the owner, wants
19 to take the property back or argue when
20 I sold this to you it had value, the
21 easement, the manner in which you got
22 onto the property existed, that had a
23 certain value and now I want to try to
24 take that back, and the law was clear
25 once you grant that, you can't take it

2 back, but whether or not it's granted
3 in the first instance is a question of
4 fact.
5 I don't see at this point any
6 reason that the status quo should not
7 be maintained. I know there is a
8 finding that there be a likelihood of
9 success on the merits, but it's a
10 reduced burden that has to be shown
11 here.
12 I looked at the case law briefly
13 in the brief. Given what is at stake,
14 that's a finding the Court has to make,
15 and at this time, given that the only
16 argument, and I am going back to the
17 argument by counsel, was that reference
18 to the public highway as a matter of
19 law is what creates the easement, I
20 find that if that is going to be the
21 sole issue in this case, that there
22 would be a likelihood of success on the
23 merits for the respondents.
24 I don't know that once the facts
25 are established that the easement

wasn't in fact created factually, but after reading Holloway and Tarolli, I cannot find as a matter of law-- if I were to find as a matter of law the reference created in easement, then obviously there is no likelihood of success on the merits.

I do not read Holloway or Tarolli in that fashion. I will grant the preliminary injunction at this time, but again, the language, and I am not signing the Order to Show Cause at this time because we are already past that.

MR. DONNELLAN: May I object to that? We have not briefed or opposed issues on a preliminary injunction issue. This is supposed to be only a temporary restraining order. We actually have not been given notice of the preliminary injunction application, and there are different issues that address the preliminary injunction application, and in the very brief period of time that we had to submit

2 opposition to a temporary restraining
3 order, we slapped some papers together,
4 but that was only addressing the
5 temporary retraining order which is why
6 this is on for today.
7 The temporary restraining order
8 has not even been signed.
9 THE COURT: You want to be heard?
10 It was my understanding, and I thought
11 this was made clear at the beginning of
12 this proceeding, when I said if this
13 were on for a TRO, this should have
14 been signed by a judge in my absence
15 given a return date for the preliminary
16 injunction that this was brought on, I
17 am not quite sure, and I said this at
18 the beginning, I don't know how, but I
19 said three hours ago that we were going
20 to address the issue of the preliminary
21 injunction today.
22 I wouldn't have spent three hours
23 on a TRO, I don't know who would. That
24 is something that is signed in three
25 minutes and you folks are told to come

2 back. The reason I went to the lengths
3 that I went through today to look at
4 the exhibits, to look at the evidence
5 that is before me by way of the maps,
6 to hear the exhaustive arguments that
7 were made with respect to Holloway,
8 Tarolli, the 18 exhibits attached to
9 your moving papers, I read the
10 responding papers. It was my belief
11 that we were here and everybody was
12 here to deal with the preliminary
13 injunction issue. I don't know when
14 everybody shows up to deal with a TRO.
15 MR. DONNELLAN: Your Honor, we
16 were given notice, 24 hour notice as
17 required by the rules to show up on
18 Friday because a TRO application was
19 going to be submitted. Counsel is
20 required to provide us with notice of
21 that.
22 We came to the Court Friday at the
23 time scheduled for the purpose of
24 arguing opposition to the TRO. It's a
25 very important property right that was

adjourned until today, and given that we now had more than 24 hours, we did have time to address at least in writing some issues that we wanted the Court to consider with respect to the temporary restraining order.

THE COURT: That is not quite fair. You are going to submit-- if we are going to limit this, then we will limit this to the papers that you have submitted.

You have had three hours today to listen to the Court's questions. You waited for me to make a ruling and now you are saying you want additional time to brief the preliminary injunction issue which would give you an opportunity to brief issues well beyond what you would have briefed had I just signed the TRO and put it down for a return date.

MR. DONNELLAN: Your Honor, we said in our preliminary statement and our memorandum of law that we are only

briefing the issues in the TRO.

THE COURT: Which was handed to me as I came into the courtroom. On the record I indicated it seemed we moved past that given everybody is here, and when everybody appears-- you are beyond the TRO issue. The temporary restraining order based on the case law, and I can get a quick look a Siegel, is something granted by ex parte application when folks come into the courthouse and it's granted until there is an opportunity to be heard.

Now, if you had been retained yesterday, I might say to you okay, you are at a disadvantage, but after three hours of arguing the merits of this issue, the mere fact that everybody is here I think as a matter of law transforms this proceeding from a temporary restraining order into one of a preliminary injunction.

I don't believe I can issue a TRO once all parties are present and have

2 been heard on oral argument.
3 MR. DONNELLAN: Your Honor, it is
4 required by the rules. An ex parte
5 order would not be permitted without
6 notice to our side.
7 THE COURT: Without notice.
8 MR. DONNELLAN: That's why I had
9 an opportunity to be here.
10 THE COURT: No, no, I can grant,
11 if the parties come in and provide an
12 affidavit that you are on notice, I can
13 grant a TRO without hearing from you,
14 then when you come in and I hear from
15 you, it gets converted to a preliminary
16 injunction, so a TRO can be granted
17 without hearing you, but cannot be
18 granted without proof that you were put
19 on notice.
20 MR. DONNELLAN: And I was put on
21 notice and I am here to argue the TRO.
22 I was not given an opportunity or make
23 a record, because whatever happens here
24 of course is going to the Appellate
25 Division, and I should have an

2 opportunity to make a record for the
3 Appellate Division and I haven't had a
4 chance to do that.
5 THE COURT: Let me say this, then.
6 The restraining order I will grant, and
7 if you want an opportunity to brief
8 additional arguments, I am not going to
9 deprive you of that.
10 This matter has been going on so
11 long, to deprive you of that is
12 ridiculous. I just think it's been a
13 colossal waste of everybody's time. If
14 we were here on a TRO. I would have
15 signed it three hours ago.
16 If it was my mistake, I apologize.
17 If not, I don't know why we sat there.
18 Has anybody in your careers sat for
19 three hours on a TRO?
20 MR. BENOWICH: Can't say I have.
21 THE COURT: Anybody besides
22 counsel have the impression that we
23 were here to decide a TRO rather than a
24 preliminary injunction?
25 MR. BENOWICH: No, your Honor. I

never had anyone who opposed an application for a TRO put papers in at that point, so I would have thought, and it was my expectation once we saw their opposition which we got before we came into court today, that that was their opposition.

MR. DONNELLAN: I am simply going by the rules. There was an application for a temporary restraining order that was being submitted.

THE COURT: Let me say this. I will give you the opportunity, but my interpretation of the rules are different. My interpretation of the rules are once we appear, TRO is an ex parte application that can only be granted historically as against a municipality if they were put on notice.

The rules changed recently requiring you to have notice up until about a year ago. You didn't even get notice on a TRO unless there was a

2 restraining order as and against a
3 municipality. Now I believe the rule
4 changed and you're entitled to notice,
5 unless an extreme hardship is
6 demonstrated.
7 Beyond that, once folks appear in
8 court, it's my opinion and
9 understanding of the rules, that once
10 we are here, we are beyond the
11 temporary restraining order.
12 If you would like, give me a
13 moment, I will read it. "A temporary
14 restraining order is an extraordinary
15 remedy that is granted, that maintains
16 the status quo up until the time that
17 both sides have had an opportunity to
18 be heard, at which time the Court
19 decides whether or not to grant a
20 preliminary injunction."
21 If there is a misunderstanding,
22 there is a misunderstanding. I will
23 give you a week. Since we had
24 extensive arguments, I don't know how
25 much time you need between now and

2 then.

3 MR. DONNELLAN: A week is good,

4 your Honor.

5 THE COURT: We will come back

6 here.

7 I will say this. In all

8 likelihood the preliminary injunction

9 will issue, unless there is different

10 arguments to be put before the Court,

11 and if in fact you want to concede that

12 there is nothing new, then we can save

13 everybody another trip here and save

14 everyone three hours. If there is

15 something new, then I'll hear it.

16 MR. DONNELLAN: I am not here to

17 waste the Court's time, so I would like

18 the opportunity to put papers in in

19 opposition to the preliminary

20 injunction, and at least from our

21 prospective, some of the issues with

22 regard to the preliminary injunction

23 are a little bit different and I would

24 like to focus on those, but I will

25 certainly not waste the Court's time

1
2 rehashing what we talked about today.
3 I am not even sure that we would
4 push for argument on it. We can
5 certainly appear before your Honor and
6 limit it to those issues rather than
7 waste time on it.
8 MR. BENOWICH: I would ask, since
9 we have had this extensive discussion
10 of the law and the facts, if counsel is
11 going to put in an additional set of
12 papers, I would like an opportunity to
13 reply to them.
14 THE COURT: I don't think it's
15 unreasonable given the way this usually
16 works, nobody puts papers in after the
17 Court renders a decision, and counsel
18 had the benefit of hearing the Court's
19 questions and decision, I don't think
20 it's unreasonable, although it may not
21 be the normal course of a preliminary
22 injunction to give one an opportunity
23 to respond.
24 If you want, rather, we can come
25 back here on the return date and you

can put those papers in on the return date. This tends to mirror a preliminary injunction, or at least will tend to conform to what should happen rather than having a reply and then another hearing date.

MR. BENOWICH: Maybe I can suggest, if I can be presumptuous, if counsel has a week to get his papers, if I can get a week after that, if we can submit them and your Honor can call us in if you have questions, we would both be happy to come in, obviously we would, but if you don't think an argument is necessary, we don't have to come back.

THE COURT: I'd rather have you back. I don't know what will be put on the papers. I may have additional questions.

The 25th is a week from today.

MR. BENOWICH: Can we have two weeks, a week for his papers and a week for mine?

1
2 THE COURT: You want until the
3 1st?
4 MR. BENOWICH: Is that two weeks
5 from today?
6 THE COURT: I think so. Today is
7 Tuesday, is that correct? Today is
8 Tuesday the 18th.
9 MR. DONNELLAN: I would just
10 request that we have his papers, the
11 Court has enough time to read them, a
12 day or two in advance. I won't put any
13 more papers in.
14 THE COURT: I just need two
15 minutes. I read yours after I got on
16 the bench today.
17 MR. BENOWICH: If you want--
18 THE COURT: Two weeks goes over to
19 the 1st, so let's all come back on the
20 3rd, a Thursday, is that enough time?
21 MR. BENOWICH: Yes, your Honor.
22 THE COURT: You want until Friday
23 the 4th?
24 MR. DONNELLAN: That's fine.
25 MR. BENOWICH: What time?

2 THE COURT: Let's see if we have
3 the date down.
4 MR. WANK: When is the Court
5 requesting our opposition papers be
6 served?
7 THE COURT: By the 25th. That is
8 a week from today, correct?
9 MR. WANK: Can we have the 26th?
10 THE COURT: The 26th. You have
11 until the 2nd, and then we are back
12 here on April 4th.
13 MR. BENOWICH: April 4.
14 THE COURT: Morning or afternoon?
15 MR. DONNELLAN: Morning is good
16 for me. I will take either.
17 THE COURT: 10 a.m.
18 MR. BENOWICH: Is your Honor
19 signing the order for the TRO?
20 THE COURT: Yes. I am just
21 signing it as is. Service, has service
22 been effectuated?
23 MR. BENOWICH: Of the papers?
24 Everybody has got the papers. I think
25 they can acknowledge that on the

record.

MR. DONNELLAN: Yes.

MR. REILLY: I acknowledge receipt of all papers including Mr. Donnellan's papers.

THE COURT: Can I strike the service paragraph, then?

MR. REILLY: Yes, your Honor.

MR. BENOWICH: I think, your Honor, given that it's on the record, I think your Honor should indicate the service having been made on Friday when the papers --

THE COURT: Does everybody acknowledge service?

MR. DONNELLAN: We acknowledge service. I would like to get a copy of the completed Order to Show Cause.

THE COURT: I will strike this paragraph and note that all papers have been served.

MR. DONNELLAN: Yes.

MR. BENOWICH: If your Honor would also indicate, since the TRO is being

2 granted, after your Honor's

3 consideration of Mr. Donnellan's

4 affirmation and memorandum, that ought

5 to be recited in the order.

6 THE COURT: Which order?

7 MR. BENOWICH: The order your

8 Honor is signing. It's contemplated

9 the normal practice of my papers being

10 presented to the Court, your Honor had

11 the benefit of Mr. Donnellan's

12 affirmation and brief as well. The

13 record will show that's only fair.

14 THE COURT: The record will show

15 it. I will write all moving papers

16 have been served, and I will just

17 write -- what do you want me to put in

18 the margin to make it clear?

19 MR. BENOWICH: Together with the

20 memorandum and affirmation of

21 plaintiff's counsel in opposition, his

22 affidavit, I am sorry.

23 THE COURT: In opposition to the

24 TRO because that is what counsel is

25 telling me it is rather than opposition

all together, so it doesn't come out pretty, folks, but all moving papers have been served, I initialed that together with memo and application of plaintiff and Affidavit in Opposition to the TRO and I initialed that, is that sufficient?

MR. BENOWICH: Yes.

THE COURT: It would have been a lot neater if my law clerk was here. Opposition of this motion shall be filed with the Court no later than what I did I say, March 26th?

MR. BENOWICH: Yes.

THE COURT: Any reply papers I said by April 2nd, right?

MR. BENOWICH: Yes.

THE COURT: Oral argument is directed. I will get copies of this. Thank you.

1 C E R T I F I C A T I O N

2

3 STATE OF NEW YORK)

4) ss.

5 COUNTY OF WESTCHESTER)

6 I, HOWARD BRESHIN, a Court Reporter

7 and Notary Public within and for the State of New

8 York, do hereby certify:

9 That I reported the proceedings that

10 are hereinbefore set forth, and that such

11 transcript is a true and accurate record of said

12 proceedings.

13 I further certify that I am not

14 related to any of the parties to this action by

15 blood or marriage, and that I am in no way

16 interested in the outcome of this matter.

17 IN WITNESS WHEREOF, I have hereunto

18 set my hand.

19

20 ______________________

21 HOWARD BRESHIN,

22 SENIOR COURT REPORTER

23

24

25

B

Exhibit B

NEW YORK STATE SUPREME COURT
COUNTY OF WESTCHESTER : PART RJ

SEVEN SPRINGS, LLC,,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

INDEX NO. 9130/06

Westchester County Courthouse
White Plains, N.Y. 10601
APRIL 4, 2008

B E F O R E:

HON. RORY J. BELLANTONI,
Acting Justice of the Supreme Court

SUSAN M. LANZETTA
Official Court Reporter

A P P E A R A N C E S:

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CHRISTEN HOLT, ESQ.

2 THE COURT: Let me start with the
3 letter I was about to discuss that I
4 received yesterday, and again, the way
5 things work here, I received Mr.
6 Donnellan's letter to Judge Nicolai, the
7 reply is dated April 3rd, although faxed
8 at 1417 which would be 2:17 the fax is
9 not on this floor, there is one fax for
10 six judges and everybody else and I
11 didn't see those letters opposing the
12 transfer to the Environmental Part until
13 this morning. It's my understanding
14 Lisa Florio and Judge Nicolai had not
15 seen any letters opposing the transfer
16 as of last night either. The only
17 letter they had was from Mr. Donnellan.
18 In my conversations with Judge Nicolai,
19 I advised him somewhat, I don't like to
20 use the word bizarre, but different
21 nature of these proceedings, the fact
22 that there was a problem in the manner
23 in which the case was assigned, if not a
24 problem, a question, the fact that the
25 matter had come in on the 14th, no judge

2 signed a TRO or the order to show cause,
3 somehow it made its way to me on the
4 17th. The parties were told to come in
5 again without the order to show cause
6 being signed but I also did discuss with
7 Lisa and Judge Nicolai that we did have
8 a rather substantial hearing or
9 proceeding on the 18th that was nearly a
10 three hour proceeding where I took oral
11 argument, I reviewed all the exhibits,
12 there were no witnesses, no independent
13 fact witnesses to offer testimony but
14 the extent that the exhibits would be
15 considered evidence, I reviewed
16 exhibits, I took the opportunity to step
17 off the bench and read case law. I came
18 on the bench and made a ruling on what
19 at the time I indicated was the
20 preliminary injunction and received an
21 objection on that ruling from Mr.
22 Donnellan based on procedural grounds
23 and I granted the adjournment until
24 today. It is clear in the record and
25 it's why I spent a substantial amount of

2 time reviewing that, that my ruling on
3 the 18th was that the preliminary
4 injunction would issue, most likely
5 would issue. Today's proceeding would be
6 one where I would reconsider that
7 ruling.
8 So we were really adjourned to today
9 for a reconsideration of my initial
10 ruling. It was my position, and still
11 is quite frankly based on what I've
12 reviewed subsequent to that proceeding,
13 that once all parties are here the Court
14 certainly has the discretion of going
15 forward on the TRO or transferring that
16 action on one involving the granting of
17 a denial of the preliminary injunction.
18 As I read on the record last time we
19 were hear from Siegals, I'll read it
20 again, a temporary restraining order is
21 an extraordinary remedy that is granted
22 that maintains the status quo up until
23 the time that both sides have had an
24 opportunity to be heard at which time
25 the Court decides whether or not to

2 grant a preliminary injunction.
3 However, in the interest of justice and
4 fairness I did grant this adjournment.
5 None of that was in the letter to Judge
6 Nicolai. He was unaware of it. When he
7 became aware that there had been a
8 proceeding rather than simply a signing
9 of a TRO, he indicated the matter should
10 proceed here today on the preliminary
11 injunction and subsequent to any ruling
12 I make here, he will then take the
13 letters under advisement, will review
14 any matters that are outstanding. I
15 think there is also a separate action
16 that Mr. Trump brought for damages,
17 three hundred million dollar lawsuit
18 pending somewhere else.
19 MR. DONNELLAN: Yes, its recently
20 commenced a separate action against the
21 town only.
22 THE COURT: Is it pre- RJI?
23 MR. DONNELLAN: Pre-answer. We just
24 gave an extension of time to counsel.
25 THE COURT: In the past two weeks

2 I've attempted to, through the Clerk's
3 Office, ascertain the status of that
4 action. I understand why I couldn't
5 find anything, it has not made its way
6 here yet. But, quite frankly, it's
7 unbelievable but I can't get an answer
8 as to whether or not the underlying
9 action has been assigned to me or not.
10 Judge Nicolai will resolve that.
11 In the meantime, we are here to
12 resolve the preliminary injunction
13 issue. I think the papers do raise some
14 arguments. Mr. Donnellan on the day he
15 did request that I grant the
16 respondent's in the order to show cause
17 time to brief these issues, argued there
18 would be somewhat different arguments
19 made than with respect to the TRO. To
20 his credit, they are somewhat different,
21 and again I don't believe he took
22 advantage of the fact that the Court
23 either made a ruling or can be said
24 tipped its hand. To me, I read the
25 papers as having been written in the

2 same way they would have been written
3 had we not had that proceeding. There
4 was no discussion, quite frankly, of
5 anything I said or any argument as to
6 why I was right or wrong. The papers
7 were written, again in this sense I do
8 commend the parties, in such a way as to
9 address these issues without taking an
10 unfair advantage of having a sneak
11 preview into the Court's thinking or
12 rational. So, again I do commend the
13 parties for that but think it does
14 warrant some time today to go through
15 these issues again.
16 What we need to do is start with the
17 decision from the Appellate Division
18 because that in some sense as was argued
19 by counsel may preclude me from
20 revisiting certain issues or it may not.
21 Mr. Donnellan, again as I mentioned last
22 time, it's always my custom and practice
23 to read everything that comes in, but to
24 make a record as if I haven't. I don't
25 want the record to be void of these

2 arguments or facts. Let's start by
3 discussing what you feel the Appellate
4 Division resolved and what you feel I'm
5 precluded from resolving as a result of
6 that decision.
7 MR. DONNELLAN: Yes, Your Honor.
8 Thank you. I think it's a narrow issue
9 and it's down to the issues of obviously
10 that the Appellate Division found that
11 we had stated a cause of action, it did
12 not rule on the merits of that cause of
13 action. We understand that, it was a
14 3211 motion to dismiss. And there are
15 certain defenses that were raised by the
16 defendants in this case that the Court
17 considered on the appeal, they were
18 fully briefed and argued. The
19 abandonment and adverse possession
20 claims, and the Appellate Division found
21 that the defendants did not demonstrate
22 those defenses as a matter of law. But
23 those, I think, are still in the case
24 because there may be issues of fact with
25 respect to those or certain of the

2 merits are going to come up whether in
3 this proceeding or later in this case.
4 But, the merger and the common grant
5 issues I believe are issues that have
6 been decided by the Appellate Division.
7 THE COURT: Let me ask this. There
8 was one issue that sort of changed
9 throughout the papers, this may be
10 better addressed to counsel, you had
11 prepared the papers submitted most
12 recently.
13 MR. WANK: I prepared them with Mr.
14 Donnellan.
15 THE COURT: Whoever.
16 MR. DONNELLAN: He's the brains
17 behind them.
18 THE COURT: My reading, there is a
19 lot of thought I'm giving to this as we
20 move forward, as I read the decision
21 from the Appellate Division on the issue
22 of what has survived in the sixth
23 paragraph on page two, the Appellate
24 Division writes contrary to the
25 respondent's contention, the plaintiff's

2 sufficiently stated a cause of action
3 based on an implied private easement
4 rising in '73 when the Foundation
5 conveyed the predecessors an interest of
6 parcel of land bounded by a road owned
7 by the Foundation and used at the time
8 as a public highway. Make a note, I
9 want to discuss this later, what the
10 word bounded by means. One of the
11 things important when we read Holloway,
12 my understanding of Holloway the
13 perception that I had was that Holloway
14 really pertained to property where the
15 road traversed two pieces of property,
16 was between them, and there was a
17 question as to whether or not that road
18 was being used as a boundary and who had
19 a right of way. It's my understanding
20 in this case Oregon Road runs almost
21 perpendicular to the property in
22 question and is used as a marker. In
23 the last proceeding, reviewing the
24 transcript, it was conceded that the
25 Conservancy owns the property on both

sides of the first hundred yards or so of Oregon Road and that was not in dispute, something to think about down the road. The part of the decision I want to discuss is the Appellate Division goes on to say the abandonment of a public highway pursuant to Highway Law Section 205 does not serve to extinguish private easements. What I thought was somewhat interesting about the argument that was made, is that the Appellate Division mentions that you sufficiently stated a cause of action. The papers, in your papers, I notice the language that was used as it progressed went from stating a cause of action to adequately stating a claim to in a footnote your belief that the Appellate Division found that you had a meritorious claim and this goes to the likelihood of success on the merits. I need it explained to me the difference between stating a cause of action and finding one has a meritorious claim.

2 The way I read that, you look at
3 traditional cases where the courts have
4 recognized extensions of torts, whether
5 they are negligent afliction of
6 emotional distress or intentional, it's
7 one thing for the Court to say we
8 recognize what's going on here as a
9 valid cause of action and another to say
10 not only do we recognize it as a valid
11 cause of action but the plaintiff has a
12 meritorious claim with respect to that
13 cause of action. I don't know whether
14 that was just a loose utilization of
15 adjectives or in fact it's your opinion
16 that the Appellate Division was
17 commenting not only the fact that the
18 claim existed but the merits of the
19 claim.
20 MR. DONNELLAN: The reason we feel
21 that way, Your Honor, is because ninety
22 percent and perhaps a hundred percent of
23 our claim is based upon a chain of
24 title. I'm sure we'll get into a
25 discussion on the intent issue and

whether the public and private roads -- let's put that issue aside for a second. But the rest of our case is totally dependent upon the chain of title and the documents in the chain of title. Those were before the Appellate Division, they are before the Court here. Those facts are not going to change. It's that analyses that was done by the title companies and it was ultimately done by the Appellate Division in analyzing the claim.

THE COURT: When you refer to the title company, are you referring to the letter that you submitted?

MR. DONNELLAN: No, there are two title companies. There is our title company that we submitted a title in our original motion papers.

MR. WANK: In the original motion papers before Judge LaCava which were ultimately before the Appellate Division, there was also a certified title search submitted to the Court and

2 also in these papers there is another
3 letter from another title company also
4 confirming the private easement.
5 THE COURT: I don't know whether
6 you were referring to one or both.
7 MR. DONNELLAN: The important part
8 and reason why we put in the certified
9 title search is because that actually
10 constitutes evidence. I forget the cite
11 to the CPLR, but putting in a certified
12 title search from a title company can
13 constitute evidence of the title. And,
14 those are the facts of the case. Those
15 facts are never going to change. Those
16 deeds are in the record, they are in the
17 chain of title and that's what we are
18 relying on for our easement argument
19 because in 1973, what the Court is
20 referring to, January of 1973, at that
21 time when the deeds were issued from the
22 common grantor they were bounded by a
23 public road and those facts are in the
24 record and those facts are not going to
25 change.

1
2 THE COURT: You in your papers when
3 you refer to, Exhibit G, the letter from
4 Land America Common Wealth for the
5 proposition that I believe it was the
6 town was on notice that there was a
7 private easement over the property. As
8 I read from that letter, the letter
9 talks about, as a general rule, public
10 highways are burdened by both easement
11 which are ordinary and tradition and
12 also private easement held by abutting
13 access. A street closing by a
14 municipality does not affect these
15 private easements. The next sentence
16 I'm not sure I understand, it seems to
17 run contrary to Holloway, the rule
18 concerning private easement by abutting
19 owners is not universal. When a street
20 is owned by the municipality private
21 easements do not exist. Isn't that
22 opposite to what the Appellate Division
23 says? Didn't they say even though a
24 street may be a public highway, the
25 closing of the public highway doesn't

2 affect the private easement?
3 MR. DONNELLAN: Two different facts,
4 Your Honor. What the title company is
5 making reference to there is if the
6 municipality actually owns the bed of
7 the street which is possible, in our
8 case it's not. In our case the
9 municipality never owned and never
10 claimed that they actually owned fee
11 title to the bed of the street.
12 THE COURT: Is that in the
13 Conservancy or is anyone alleging that
14 the municipality owned Oregon Road?
15 MR. BENOWICH: I'm not taking a
16 position on it.
17 MR. DONNELLAN: And the change of
18 title that we have I think establishes
19 title to certain areas of Oregon Road,
20 Seven Springs has fee title to the bed
21 of the road, to that portion of Oregon
22 Road in front. I think the Nature
23 Conservancy likely has fee title to that
24 portion of Oregon Road that runs through
25 the center. Even the descriptions of

2 their property are on two separate
3 parcels and it borders Oregon Road.
4 Their deeds included the same pertinence
5 clause which gave them rights to the
6 center line.
7 THE COURT: Let me reference your
8 memo, page fifteen, footnote four,
9 that's where the discussion of what the
10 Appellate Division did goes from
11 recognizing a cause of action in saying
12 Judge LaCava was wrong to the extent
13 that if a public highway was closed it's
14 not determinative of the matter. The
15 cause of action for a private easement
16 can't survive that and one has been
17 stated here. Again the question is what
18 does one have to do to state a cause of
19 action. It is simply to say we believe
20 we have a private easement because of
21 exactly the reasons you've stated here
22 and then you have a cause of action.
23 The Appellate Division never used the
24 word meritorious. In footnote four we
25 have the argument that the Appellate

2 Division has already determined in the
3 February 13, 2008 decision that Seven
4 Springs has a meritorious claim to an
5 easement. I guess it's my position
6 unless you convince me otherwise that
7 what the Appellate Division did is
8 recognize a cause of action, no doubt
9 about that, but it's my opinion they
10 didn't really speak to the merit of the
11 cause of action. Maybe it's a
12 distinction without a difference. If it
13 is, it is.
14 MR. DONNELLAN: The only thing I can
15 really say, obviously they don't use the
16 word meritorios. I agree. But the
17 elements of the cause of action include
18 the chain of title in describing that
19 chain of title, describing the
20 conveyance from a common grantor,
21 abutting a public highway and all of
22 those allegations in our complaint which
23 were strenuously analyzed by all parties
24 in connection with that appeal. And
25 those facts are particularly pleaded in

2 the complaint and those facts that
3 relate to that chain of title and which
4 deeds went to who and what they said
5 are, as I've said, are incontestable.
6 Now when we get to the issue of
7 intent, which I know is an issue in this
8 case, the Tarolli case, and I would like
9 to focus on that today, because that I
10 think is really where you get to next
11 and that's what I would like to argue to
12 the Court and show the difference
13 between a public road and private road
14 and what the real differences and
15 reasoning behind it which I think
16 Holloway talks about. The rest of the
17 case was before the Appellate Division
18 and those facts are not going to change.
19 I think this really comes down to
20 whether or not we need to show any
21 intent or is it self-evident. The rest
22 of the case can't be contested. It was
23 reviewed by the Appellate Division and
24 those facts in them stating we stated
25 the claim is enough or granted we would

2 have to make a motion for summary
3 judgment. Those facts are not going to
4 change, it's simply based on the chain
5 of title and deeds that are already
6 recorded.
7 THE COURT: Do you want to be heard
8 with respect to the issues discussed so
9 far?
10 MR. BENOWICH: I think they can be
11 answered quickly. If I repeat myself, I
12 apologize. I agree with Your Honor that
13 the Appellate Division said without
14 trying to use their words you've stated
15 a claim but as we all know as trial
16 lawyers and you as a trial judge, the
17 difference between stating a claim and
18 proving it is a world of difference.
19 That's no where more evident that when
20 the Court at the end of its decision
21 considered whether the defenses of
22 abandonment and adverse possession were
23 sufficient even if they stated a claim
24 to overcome that claim as a matter of
25 law. They cited the Court of Appeals

2 decision in Goshen which if Your Honor
3 goes back to that says that the
4 difference in burdens of proof is really
5 very important and critical to a
6 determination on a 3211 motion and a
7 determination on a later 3212 motion for
8 summary judgment which, quite frankly,
9 plaintiff's counsel is here today
10 arguing as if they had filed a motion
11 for summary judgment and plainly they
12 have not. It's somewhat surprising to
13 me that they are arguing that this
14 matter has already been determined but
15 they haven't asked for judgment on the
16 basis of that supposed determination.
17 Several other points, the Appellate
18 Division, as Your Honor said, said only
19 what it said in terms of how it frames
20 the cause of action that they say was
21 stated in the complaint. They do not
22 there in that sentence address the issue
23 which counsel says is critical to his
24 formulation which is the issue of the
25 common grantor. That is discussed

2 earlier in the recitation of facts. One
3 of the things that we had pointed out to
4 the Court, which frankly is also
5 apparent from the deeds, but we point it
6 out even more in the reply, is that the
7 plaintiff's parcel as currently owned is
8 not the same parcel that was conveyed by
9 the Foundation to Yale in January of
10 1973. This may well be a very
11 interesting part of the County but the
12 piece of land that is now owned by Seven
13 Springs that was not owned by the
14 Foundation in 1973 is a parcel that had
15 been owned apparently by HJ Heinz, the
16 ketchup heir. It's larger. It has
17 additional land. There are several
18 decisions from the Second Department and
19 elsewhere that indicate you can't use
20 even if they have an easement, you can't
21 use it for the benefit of an after
22 acquired parcel. That would, at the
23 very least, raise an issue of what they
24 could use even if they have it and we
25 don't concede they have it.

2 Let me get to counsel's points that
3 all of this had been raised and briefed
4 and considered by the Appellate
5 Division. I don't believe that to be
6 the case. If Your Honor goes back to
7 the briefs without trying to ask Your
8 Honor to read the hundreds of pages of
9 what was filed, the defendant's motion,
10 even if the plaintiff has an easement he
11 lost it one way or the other. He lost
12 it by the town's action in the closing.
13 It was lost by merger abandonment and
14 extinguishment. While they did brief
15 the issue that they have an easement we
16 did not meet that issue head on in terms
17 of what was presented and argued to the
18 Appellate Division. So when you come to
19 the issue as they have tried to frame it
20 that the statement of their cause of
21 action is a law of the case
22 determination, we've referred to the
23 cases in our reply brief which show that
24 is plainly not true again for similar
25 reasons as the Court and Goshen raise

2 which there are very different burdens
3 of proof. Had we been able to establish
4 as a matter of law the defense of
5 adverse possession or abandonment this
6 case would be over.
7 THE COURT: Let me stop you for a
8 second, I apologize for my confusion on
9 this issue, it's my understanding that
10 with respect to a 3211 motion, and this
11 may go back to the significance that
12 raising the issue has before the
13 Appellate Division, that there are
14 specific grounds for raising or moving
15 to dismiss pursuant to 3211, the issue
16 of the private easement being abandoned,
17 adverse possession, I know this is a
18 difficult question because you address
19 them but are they really appropriate to
20 be addressed in a 3211 motion? Can they
21 ever really be established as a matter
22 of law versus having to go through some
23 discovery and establishing them after
24 you establish some facts? I'm not sure
25 how they could ever be established on a

2 3211 motion.
3 MR. KIRKPATRICK: Certainly next
4 time this comes up I am going to
5 consider whether I have evidence that
6 says as a matter of law or whether it's
7 evidence which I believe at a trial with
8 witnesses and Your Honor or a jury
9 considering whether it meets my burden
10 of clear and convincing evidence.
11 Because there is a difference, as I read
12 the law, between the clear and
13 convincing standard and proof as a
14 matter of law. If I get anywhere in
15 between there I can win and prove my
16 defense and win the case. Perhaps we
17 were moving too quickly in thinking what
18 we had was as a matter of law but I
19 certainly do believe, Your Honor will
20 determine this, I do believe the
21 evidence we have which right now is
22 undisputed and uncontroverted would be
23 clear and convincing evidence of
24 abandonment and adverse possession at
25 the very least. So maybe we jumped the

2 gun. If that's the case, we all
3 apologize for that and we learned our
4 lesson and the Appellate Division said
5 that's too fast. I think all that was
6 determined was, as Your Honor quite
7 rightly said, a 3211 motion assumes the
8 truth of the allegations in the
9 complaint. We couldn't controvert what
10 he said because the standard doesn't
11 allow it. What we did was to say
12 assuming everything in the complaint is
13 true, these defenses, pardon the
14 expression, trump your cause of action.
15 Judge LaCava said yes, Appellate
16 Division said no. That issue will be
17 presented now that the case has been
18 remanded. But that's the status of the
19 determinations. There is no law of the
20 case. What Judge LaCava decided has
21 been reversed. So there has been no
22 determination as to the easement or
23 defenses.
24 THE COURT: I only raise the issue
25 I raised because the Appellate Division

2 goes on to say respondents failed to
3 conclusively establish this defense as a
4 matter of law for the purpose of a
5 motion to dismiss and then similarly the
6 respondents fail to conclusively
7 establish, they don't repeat the
8 language, for the purpose of a motion to
9 dismiss with respect to adverse
10 possession, certainly the use of the
11 word similarly, and failed to
12 conclusively establish I would read that
13 as saying the same thing and, quite
14 frankly, I see this a lot in summary
15 judgment motions. Attorneys become so
16 convinced of their position they argue
17 as a matter of law there is no triable
18 issue of fact and you read them and say
19 what you are assuming is not a triable
20 issue of fact is a triable issue. I
21 apologize, I'm not criticizing anybody's
22 papers. I don't see how anybody, unless
23 the other side were to concede all of
24 the five factors needed for adverse
25 possession, how it could ever be

2 established as a matter of law on a 3211
3 motion. That being the case, I don't
4 know the Appellate Division's failure to
5 grant that relief is common on the
6 merits of the defense or you jumped the
7 gun here. You need to prove this. You
8 need to demonstrate was open and
9 notorious, you need to demonstrate, just
10 because you say so doesn't make it so,
11 so we're not considering it. The
12 Appellate Division specifically says
13 only for the purpose of the motion to
14 dismiss that hasn't been decided. We
15 discussed the meritorious aspect versus
16 stating a cause of action. We'll go
17 back in a minute to other issues.
18 Can we discuss one issue and that is
19 the term abutting, I mentioned this
20 before in terms of my understanding of
21 how these cases play out. Does somebody
22 want to take a shot at explaining to me
23 how that term is used in the common
24 parlance of real estate. Is it property
25 when you talk about a road, property can

1
2 be side to side. In this case are we
3 talking about a road that cuts between
4 two pieces of property such that each
5 piece abuts, runs along side the road,
6 or the property is perpendicular to the
7 road and doesn't share that road as a
8 common boundary? Does this make sense
9 to anybody?
10 MR. BENOWICH: I'm not going to
11 profess to be a surveyor or a real
12 estate expert, but Your Honor asks a
13 good question and I don't think either
14 of us can answer you conclusively
15 because the deeds in this case talk
16 about both along Oregon Road and along
17 the face of the stone wall. You can't
18 be in two different places.
19 THE COURT: Let me try this, can
20 you see my diagram, I have two pieces of
21 property, A and B. The way I read
22 Holloway, you are talking about two
23 pieces of property where an owner of A
24 deeds this property to B and there is a
25 road that runs between them. The road

2 is used as a boundary. The properties
3 abut this roadway and the question then
4 becomes if it's used as a marker does
5 one person own the road or not and that
6 so does the other have some kind of
7 easement? The way I understand this
8 from the last argument is it's conceded
9 here that A and B and the property going
10 under the road on the part of the road
11 in question are owned by the
12 Conservancy. That somewhere up here
13 where I have marked C the property owned
14 by Seven Springs is the property owned
15 by Seven Springs and Oregon Road from
16 here up it's conceded is owned by Seven
17 Springs and the Conservancy and is split
18 somewhere in the middle of the road. My
19 confusion or maybe not confusion, it is
20 my understanding of the case law when we
21 talk about using this as a marker, it's
22 between two pieces of property and not
23 using Oregon Road, let's say the first
24 hundred yards here as a reference with
25 respect to the property above it and

2 saying, well, ownership begins
3 somewhere -- what is the road down here?
4 MR. BENOWICH: It is Oregon Road all
5 the way up from Byram Lake Road.
6 THE COURT: Is it ever
7 perpendicular?
8 MR. KIRKPATRICK: It goes
9 perpendicular at the end. Did you by
10 chance look at the global map? I made
11 some copies and it gives you something
12 to look at.
13 MR. DONNELLAN: Exhibit A.
14 THE COURT: I'll take copies of it
15 for the sake of trying to understand
16 this. My question is as you turn off of
17 Byram Lake Road and enter Oregon Road
18 it's my understanding that there is a
19 certain portion of Oregon Road that it's
20 undisputed that the Conservancy owns the
21 land on either side of Oregon Road; is
22 that correct?
23 MR. DONNELLAN: Yes, Your Honor, but
24 your diagram is wrong. Byram Lake Road
25 is far away from all of this, all these

2 properties we're talking about. And the
3 public portion of Oregon Road does
4 intersect with Byram Lake Road I think
5 in Bedford and North Castle; is that
6 correct?
7 MR. KIRKPATRICK: That's correct.
8 MR. DONNELLAN: Byram Lake Road goes
9 all the way around the lake. It's in
10 North Castle and Bedford. Oregon Road
11 actually goes from the North Castle side
12 of Byram Lake Road and it goes through a
13 big public portions where there are
14 houses and so forth.
15 THE COURT: So Oregon Road is not
16 closed the second you turn from Byram
17 Lake to Oregon?
18 MR. DONNELLAN: No.
19 THE COURT: It's open for some time
20 until you get to where it is gated?
21 MR. DONNELLAN: For a couple of
22 miles. And then there is another
23 section of Oregon Road that's in Bedford
24 that comes off the north section of
25 Byram Lake Road where it comes on the

1
2 north side of the lake and that comes
3 into Seven Springs property again a
4 public portion of Oregon Road, not in
5 dispute in this action but it's the
6 other side of Oregon Road.
7 MR. KIRKPATRICK: If I could take you
8 through these. One is at a very large
9 scale and Byram Lake is in the middle
10 where you see 684. Then you step down
11 to which Byram Lake takes up a large
12 portion of the picture and then you step
13 all the way down to where you see a
14 subdivision of houses in the lower left
15 and in the upper middle an open space.
16 So going backwards, that subdivision of
17 houses is on Oregon Hollow Road which
18 comes off the open portion of Oregon
19 Road and to the right of it you can see
20 the pavement where it ends of Oregon
21 Road. That open space at the top is a
22 meadow on the Seven Springs property.
23 So, what we're talking about is a
24 section of road that you could talk
25 about its ownership in three pieces. At

2 the far northern third half is owned by
3 Seven Springs and half is owned by the
4 Nature Conservancy. The middle third,
5 both sides, both halves, are owned by
6 the Nature Conservancy. The bottom
7 third, I'm using third loosely, one side
8 is owned by the Nature Conservancy, the
9 other side was owned by REALIS Property
10 and now belongs to Seven Springs. But,
11 you are talking about a road that as
12 demonstrated in the Seven Springs
13 environmental impact statement in the
14 archeological studies done for that, you
15 are talking about a road that has
16 existed in some form pre-history and it
17 has had possible other alignments. As
18 you look at these air photos it's quite
19 difficult to pick out what is presently
20 in dispute and at the same time you can
21 pick out other trails that look like
22 they might be Oregon Road.
23 Nevertheless, it appears that in the
24 early part of the twentieth century,
25 Meyer purchased the land and through it

2 ran something called Oregon Road. He
3 then deeded to others and we're now in
4 the situation that those parcels, as Mr.
5 Benowich pointed out, are described
6 sometimes by references to Oregon Road
7 and sometimes by references to stone
8 walls which apparently run along Oregon
9 Road. And Oregon would appear to vary
10 in width from thirty to fifty feet wide.
11 We are not entirely sure.
12 THE COURT: Step up here and let's
13 do this on the map. I'm going to mark
14 it if nobody objects to marking it. Step
15 up.
16 (All counsel approach the bench off
17 the record.)
18 THE COURT: We had a discussion off
19 the record, I have a better
20 understanding now of what part of Oregon
21 Road is in dispute. It was my
22 understanding when we were here last
23 that there was a particular very limited
24 portion that's in dispute. In reading
25 the original complaint, in reviewing

2 that Exhibit A to the complaint,
3 paragraph 8 and going to paragraph 25,
4 first with respect to paragraph 8 in the
5 hilighted portion of the exhibit
6 although the macadam road is not
7 identified on the exhibit to the initial
8 complaint, it appears to be the only
9 roadway to the right of Oregon Road and
10 the hilighted portion of the disputed
11 portion of Oregon Road goes beyond,
12 appears to go beyond macadam road on the
13 larger map. My understanding of the
14 portion of Oregon Road which is in
15 dispute from last week, appears to be
16 incorrect. That it appears now that the
17 entire portion, or at least that portion
18 up to and to some extent beyond macadam
19 road is in dispute and the plaintiffs
20 are claiming, paragraph 25, does
21 somebody have that language for me, it's
22 either right of access -- is it right of
23 way and/or easement?
24 MR. KIRKPATRICK: Right of way
25 and/or easement.

2 THE COURT: Right of way and/or
3 easement overall of Oregon Road by
4 virtue of the fact that the Seven
5 Springs property abuts the Conservancy
6 property. We've discussed both on and
7 off the record this idea of the word
8 abutting. My understanding of the word
9 abut would mean just as it is portrayed
10 on the map that was submitted both in
11 the original papers and today's papers,
12 that is that portion of Oregon Road
13 where the Conservancy and Seven Springs
14 own land on either side of the road each
15 parcel is said to abut that portion.
16 There is a portion below where the
17 Conservancy owns property on both sides
18 of the road and my understanding then is
19 any property Seven Springs owns to the
20 north of that, although it may in fact
21 sit on a corner, there may be an
22 intersection between Seven Springs
23 property and the Nature Conservancy
24 property and that property may in fact
25 abut in a north and south manner, Oregon

2 Road is not between the property where
3 the property abuts each other. I guess
4 the short of it is it's clear to me now
5 that we're talking about this action
6 having rights declared with respect to
7 more than simply the first one hundred
8 yards of Oregon Road. This action
9 affects almost the entire portion of
10 Oregon Road.
11 We need to move forward, I don't
12 want to say start at the beginning. One
13 of the first places we have to start is
14 with the argument that the defendants
15 here under CPLR don't even have a right
16 to move for preliminary injunction. Do
17 you want to discuss that briefly?
18 MR. DONNELLAN: Your Honor, I think
19 we can get beyond that because I believe
20 they have now served an amended
21 pleading.
22 THE COURT: So the amended pleading
23 you concede serves a counterclaim or
24 crossclaim that would give them that
25 right?

MR. DONNELLAN: Yes. I don't think we should waste time on that.

THE COURT: I had said earlier given the nature of the relief, it is my inclination to hold whether it's as a matter of law or whether the Court exercising its discretion makes sense that the Court would be able to entertain an injunction in this case. I'll let you address which ever other arguments you feel are the most important. You've submitted your brief. We've been here for quite some time on both days, address the arguments you feel are the most important at this point which would prevent the granting of the injunction.

MR. DONNELLAN: Thank you. I'll try to keep it limited. I know we've been here a long time. The primary issues that I'd like to address are first the public versus private road issue and hilight a few points on that issue. Our case involves a public road. There is a

2 lot of case law cited in all of the
3 briefs and memorandums in support or in
4 opposition to this application that deal
5 with private roads. I would like to
6 talk about the distinction. Oregon Road
7 was a public road both before and after
8 the conveyance at issue in this case.
9 And the conveyance I am talking about is
10 the conveyance out to Yale in 1973 that
11 it is our position and as stated by the
12 Appellate Division that that's when they
13 believe we have stated a claim that the
14 easement was created. In 1973 Oregon
15 Road was a public road. That does not
16 necessarily mean it was owned by the
17 municipality, it just means it was
18 available to the public for public use.
19 At that time when the deed was granted
20 there was simply no need for the grantor
21 to make any special reference to any
22 easement because they were selling a
23 property that was bounded by a public
24 street. We make a point in our brief,
25 let me quote the restatement of property

2 which makes reference to where an
3 implication is, the restatement of
4 property.
5 THE COURT: Page 11.
6 MR. DONNELLAN: Yes. Creation of
7 easement by implication is an attempt to
8 infer the intention of parties to a
9 conveyance of land and the inference
10 drawn represents an attempt to ascribe
11 an intention to parties who had not
12 thought or had not bothered to put the
13 intention into words or perhaps more
14 often to parties who actually had formed
15 no intention conscience to themselves.
16 I submit that's applicable here.
17 Because when you are dealing with a
18 public street there would have been no
19 thought or conscience thought to
20 themselves as to expressing any private
21 rights with respect to a public street.
22 On the other hand, if it was private as
23 in the Tarolli case and many other cases
24 where you are dealing with a private
25 road, if the foundation had conveyed the

2 property to Yale and made reference to
3 Oregon Road and Oregon Road say was a
4 private road owned by then, then it
5 would appear there would be a question
6 as to whether it was the intention of
7 the Foundation to grant a private
8 easement beyond the bounds of that
9 property down through other property
10 which they owned at the time which later
11 became Nature Conserve property. If
12 that was a private road I could
13 certainly understand what was the
14 intention of the parties. What did they
15 intend with respect to making reference
16 to Oregon Road if it was private? But,
17 it was not. It was public.
18 THE COURT: Let me ask then on page
19 11, right above where you read from, you
20 cite the Mayo case where you are citing
21 the establishment of an implied easement
22 over a private road. Two pages later
23 you are discussing on page 13 in the
24 case here in the deed reference to a
25 public road not descriptive of the

boundaries. I'm not sure by reference to that whether -- when we were here last time you indicated my reliance on Tarolli was misplaced because Tarolli, when the Court of Appeals indicated the reference to the roadway is but one factor to consider in determining whether or not an implied easement is created, one must look at the surrounding circumstances, the difference. You argued Tarolli dealt with a private road and not a public road and that makes a world of difference. Right above the restatement of property you seem to be citing a case that involves a private road to support your position that the implied easement exists.

MR. DONNELLAN: Yes, Your Honor, because I think they are not totally inconsistent but there is a distinction. I think that there is a whole line of cases that deal with the reference to a road or a way as being an implied

2 easement. You have the Tarolli case and
3 other cases that deal with that that's
4 only one circumstance to deal with.
5 Each of those cases where they deal with
6 that discussion deal with either private
7 roads or roads, they make a distinction
8 about someone laying out streets,
9 private streets at the time, someone
10 doing a subdivision. If you grant a
11 subdivision you lay out streets in that
12 subdivision. It may be the intention of
13 the parties for those to become streets
14 for the use of those persons on those
15 lots and those cases deal with a line of
16 cases where they sold off lots and those
17 lots were adjacent to the streets laid
18 out. Those cases are good for us, too.
19 I'm saying our case is even better
20 because they didn't sell the property
21 with private streets laid out to become
22 public streets. Our street was already
23 a public street. I think those cases
24 struggle with what was the intention of
25 the parties. And I think they jump to

2 the intention of the parties if in the
3 cases where they say where the grantor
4 had laid out streets obviously for the
5 intention for them to become public
6 streets for the benefits of the lots
7 they were selling off. That's good
8 evidence, I believe the cases hold even
9 Tarolli makes reference to it to the
10 intention of the parties. Those are the
11 circumstances. Our case already has a
12 public street. You don't need to get
13 into the intention of the parties. It
14 goes without saying. It only stands to
15 reason, someone selling a piece of
16 property bounded by a public street, why
17 would they think anything else, why
18 would they have to think that just in
19 case seventeen or twenty years later the
20 town of North Castle would come in and
21 close off the public rights to that
22 street, there would be no reason for
23 them to believe that that would happen
24 in the future and no reason for them to
25 provide in their deed that just in case

2 that happened that then we're granting
3 this expressed easement. The very
4 reference to the public street and
5 boundary on the public street alone is
6 enough and that's when you get into the
7 Holloway case which is different from
8 the rest of these cases because in
9 Holloway it was a public street. And if
10 you analyze the language in the Holloway
11 case I think it really sets forth our
12 claim and supports our claim and that's
13 why the Appellate Division relied on it.
14 That language starts with, quote page
15 ten, while the grantor may have retained
16 the fee of the soil and highway, he has
17 but a naked or barren title. That would
18 not be the case with a private road.
19 There they would have the whole title.
20 This only applies if naked or barren
21 title issued only applies in the case of
22 a public street. The Court went on to
23 say in the event of discontinuance of
24 the public highway by act of law the
25 grantee and his successors in interest

2 nevertheless will still be entitled to
3 the perpetual enjoyment of certain
4 easements which were impliedly granted
5 in relation to the open way lying in
6 front of the land granted and referred
7 to as their boundary. That is exactly
8 our case. We had a public street lying
9 as our boundary so even though the town
10 seventeen years later took away the
11 public's right, you leave behind this
12 perpetual right of enjoyment for
13 easements over it. Holloway didn't need
14 to say anything else. It was a public
15 street. They didn't get into the
16 intention of the parties in Holloway.
17 There was no reason to. It wasn't a
18 private road. It wasn't a case where
19 you were laying out streets on a
20 subdivision map. It was already a
21 public street. That's why the Court
22 goes on to say the private easements may
23 be pertinent to the property abutting to
24 a public highway must be conceded.
25 Again, not qualifying that in any way as

1
2 being what the intention of the parties
3 were. Later on where it says where land
4 is granted bounded on a street or
5 highway there is an implied covenant
6 that there is such a way that so far as
7 the grantor's concern it shall be
8 continued and the grantee, his heirs and
9 assigns shall have the benefit of it.
10 The Court reasoned for this. It seems
11 reasonable and quite within the
12 principle of equity on which this rule
13 is founded to apply to the
14 discontinuance of a highway so that a
15 man should grant land bounded expressly
16 on the side of a highway, if the grantor
17 owned the soil under the highway and
18 highway by competent authority should be
19 discontinued, such grantor should not
20 use the soil of the highway as to defeat
21 his grantor's right of way or rent a
22 substantially less beneficial. Exactly
23 our case. Whether this should be deemed
24 to operate as an implied grantor implied
25 warranty covenant estoppal by the

2 grantor and his heirs is immaterial. I
3 think that's very important. What the
4 Court was reasoning here is that you are
5 selling a piece of property. It's
6 bounded by a public street, the case law
7 which we provided to the Court provides
8 that you have a right to go on that
9 public street in both discretions. If
10 somebody takes that public's right away,
11 you don't take away the private right.
12 When you want to call it an easement or
13 estoppal or covenant, whatever label you
14 want to put on it, it doesn't make any
15 sense to take that away from the
16 grantee. Because that was granted when
17 you gave them the grant accessed by that
18 roadway. And that's where I think the
19 Tarolli case is simply inapplicable
20 because it doesn't deal with a public
21 street and the distinctions dealing with
22 the parties intentions, maybe the
23 roadway would become a public street do
24 not apply here, we already had a public
25 street.

1
2 The other cases raised deal with
3 abandoned street or King case had to do
4 with the statute which provided for
5 payment for taking away the private part
6 of the street. That was our case before
7 the Appellate Division. What Judge
8 LaCava failed to consider in the
9 original motion to dismiss was when the
10 town discontinued the road that that
11 left the private easement behind and the
12 reason for that is and what we had
13 argued before the Appellate Division and
14 what the Court recognized is because the
15 statute itself in our case does not
16 provide for compensation to the property
17 owner. In many other cases including
18 the King case cited by the defendant,
19 the statute did provide for that
20 compensation so then the private
21 easement is taken away. So there can be
22 statutes where, and recognized, where
23 the private easement can also be taken
24 away by the closure of the road, only if
25 provided by the payment of that

2 compensation for taking away that
3 private right. That did not exist in
4 our case.
5 THE COURT: When we were here last
6 and discussed Holloway, I had read a
7 portion of Holloway where the Court
8 noted at the time of the sale of the
9 land to Clarkson, the open way by which
10 the grantor bounded it existed as the
11 visible incident to the enjoyment of the
12 land. One of the things I discussed in
13 my reading then, I haven't had years to
14 digest and analyze Holloway and it's
15 written in such a way one would probably
16 make a career out of analyzing and
17 reading Holloway, in my reading then and
18 since, there seems to be a thread
19 running through the case that discusses
20 what was touched upon in that quote not
21 only the fact that it's a public road
22 but the significance that the roadway
23 has to the development. In the quote
24 which I think I cited at 139 New York
25 390, it's on page 129 of the transcript

1
2 from the 18th, the Court made a
3 reference to the visible incident to the
4 enjoyment of the land. It was not the
5 only one. I raised that and discussed
6 it and I obviously in reading your brief
7 read page ten and your reference to
8 Holloway but to what extent does that
9 thread that runs through Holloway affect
10 the argument that you are making that
11 almost as a matter of law this private
12 easement is created by the existence of
13 the public highway without reference to
14 whether or not it's incident important
15 to determinative of the enjoyment of the
16 land.
17 MR. DONNELLAN: Understood. I don't
18 think it matters because it's a big
19 piece of property. Roads are used for
20 many different purposes. You can have
21 roads that are public streets that are
22 paper streets. In this particular case
23 it became a public highway actually
24 through use and that's how many, many
25 years ago. So I don't know whether it

2 was horse and buggy trails or horses,
3 this goes beyond history as a road. So
4 it was used as a road probably by horses
5 at some point in time. And how it may
6 be used in the future and its non-use
7 for any given period of time is not
8 really relevant because non-use alone,
9 even as we get to the abandonment
10 argument, no matter how long it is does
11 not constitute abandonment. The fact
12 that this road may not have been used
13 for ten, twenty, thirty years--
14 THE COURT: I may have misspoken or
15 not expressed myself, it's not the
16 non-use, it's importance of the public
17 road. Holloway, and I could be wrong,
18 it seemed that part of Holloway dealt
19 with the fact that we didn't want to
20 allow an individual to grant a piece of
21 property to somebody and then render the
22 value of that property meaningless by
23 having control over the access to the
24 property by reference to the public
25 highway or at some point the

2 municipality's closing of the street
3 which is well beyond the power of the
4 land owner and the land owner would have
5 no recourse to stop that. The closing
6 of the street would extinguish one's
7 right to get on the property and render
8 the property meaningless. What Holloway
9 seemed to deal with throughout the
10 opinion was that the public road that
11 was closed, if not the sole means of
12 getting on to the property, was the main
13 way in which these folks accessed their
14 property, they hadn't been compensated
15 either in money or some other way for
16 the loss of this roadway. I guess you
17 could be given compensation by given
18 another access to the property. The
19 Court said we are not going to allow the
20 closing of the public highway to
21 extinguish one's right to get to their
22 property. Does the fact that there are
23 other ways to enter the property play
24 into the Holloway decision?
25 MR. DONNELLAN: It does. I'll

2 explain how it applies -- it could apply
3 to a lot of different property owners.
4 Specifically the history of Seven
5 Springs and applied here, my client
6 bought this property with the intention
7 of developing. There is one house or a
8 couple of out buildings on the property
9 now, it's over 200 acres of land. The
10 plan was to subdivide the property and
11 develop homes, I think a total of
12 sixteen or seventeen homes initially and
13 made application for that development to
14 the towns of Bedford and North Castle
15 because the property is about split in
16 the middle between the two towns. If
17 the development was going to include
18 these sixteen or seventeen homes, the
19 application was made jointly to both
20 because they had to act as both lead
21 agencies. During that process and that
22 access as originally proposed was only
23 from Bedford, the intention was we would
24 not have to use the access that we're
25 talking about now because Oregon Road

2 comes from Byram Lake Road in the north
3 and Oregon Road comes in and the public
4 portion of Oregon Road on the north side
5 now deadends into the property. The
6 problem we had with Bedford is that
7 Bedford said you can't do that because
8 Bedford has a local statute that says
9 we'll only allow a certain number of
10 homes on a deadend street. Oregon Road
11 here originally was not a deadend street
12 as we talked about before. It goes from
13 Byram Lake Road on the north side, it
14 comes around the lake to the south side,
15 Oregon Road connects the two. If you
16 don't allow them to be connected then
17 you have a deadend street. With that
18 deadend street you can only allow a
19 certain number of homes to be built,
20 like five maybe. So Bedford said if you
21 can use the south end of Oregon Road,
22 the disputed portion we are talking
23 about now as emergency access, that's
24 the reason for the statute, with just a
25 deadend street coming in and for the

2 development for more than just a few
3 homes, fire trucks, it's unsafe to do
4 that. They will not allow you to build
5 a development that can be built there
6 without a secondary access. So without
7 this secondary access we cannot build
8 the original plan we wanted to because
9 it's a deadend street on the north side.
10 We've withdrawn the application,
11 we've reduced the number of homes and
12 let's assume we get that approved, those
13 houses are only in Bedford. Then the
14 property that's in North Castle, the
15 property that is serviced by the south
16 end of this road would be undevelopable
17 because there would be no access to it.
18 The access is cut off from the top and
19 they will not allow anything to be built
20 because the fire trucks cannot get in
21 there. You need access from the south
22 or at least an exit for emergency
23 reasons. So that's what has happened.
24 Without the connection of Oregon Road
25 and without the access for Oregon Road

2 effectively Seven Springs is losing the
3 benefit of it's property. The property
4 essentially becomes worthless. There is
5 no access to it.
6 THE COURT: As I understand
7 Holloway dealt with the grantor and
8 grantee of the land in question. In the
9 case before me now, we have property
10 that was transferred in 1973, it was
11 transferred to one entity back to
12 another entity, by the time your current
13 client buys this property, how does, if
14 at all, the passage of time and the
15 circumstances that arise between,
16 without talking about extinguishment or
17 merger or abandonment or adverse
18 possession, why should the principles in
19 Holloway extend beyond the initial
20 grantor/grantee relationship to a
21 relationship that is created some thirty
22 years later when your client buys
23 property and is aware of the current
24 situation, that is, the road is closed,
25 it's not being used, there is no express

easement but at some point ten years after he buys it he is now going to argue there is an implied easement over the property and rely on Holloway? Holloway talks about the grantor reserving naked title. He may have retained the fee of the soil in the highway, he has but a naked or barren title. Again Holloway seems to focus on the grantor and grantee. Here we have many grantors and grantees in between. How does it still apply?

MR. DONNELLAN: It specifically says grantee, his successors in interest, that's us. Nevertheless we are entitled to the perpetual enjoyment of certain easements. Again where it talks about the grantee, his heirs and assigns. In the third line of our quote on page 11, his successors in interest nevertheless will be entitled to perpetual enjoyment. It went back to Seven Spring Farms. It's supposed to be a perpetual enjoyment of that easement. That's why,

2 Your Honor, in the Appellate Division's
3 decision --
4 THE COURT: Going to that second
5 paragraph, I understand and I know the
6 language is in there with respect to
7 pertaining to the grantee, his
8 successors in interest, I don't know if
9 everybody who owns the land thereafter
10 is a successor in interest, assuming
11 they are, Holloway is talking about a
12 grantor with unclean hands somehow who
13 is trying to deprive a grantee of a
14 right. It goes back to the language in
15 the middle paragraph, when land is
16 granted on a street or highway there is
17 an implied covenant and there is such a
18 way. That so far as the grantor is
19 concerned it shall be continued and that
20 the grantee -- any language in the
21 decision has to have some meaning I
22 would hope. So where we have this
23 decision so far as the grantor is
24 concerned, if the Conservancy here was
25 not the grantor of the land to Seven

2 Springs, what affect does the language,
3 again there is a lot of grantor grantee
4 language in Holloway dealing with the
5 people who were part of the original
6 transaction and preventing the grantor
7 of somehow giving land to somebody and
8 then making it valueless by
9 extinguishing an easement, what would
10 that language mean so far as the grantor
11 is concerned. Beyond the grantor, what
12 affect does the grant have. I
13 understand it says it shall continue to
14 successors, it seems to be limiting
15 indicating so far as the grantor is
16 concerned it shall be continued.
17 MR. DONNELLAN: I don't think it
18 does, in the Appellate Division case it
19 refers to the grantor as predecessor in
20 interest again in line with they are the
21 predecessor in interest to the
22 defendants. They used to own the
23 property which is burdened by this
24 estate that we're talking about. I
25 don't think it changes simply because

2 the grantor in this case conveyed their
3 property to the defendants. It's the
4 same property that's burdened by the
5 estate. These are easements burdened by
6 those estates and the grantors and
7 grantees each have successors in
8 interest here. We are the successors in
9 interest to the grantor on our piece.
10 They are the successors in interest on
11 their piece.
12 THE COURT: Do you want to address
13 the argument now or the irreparable
14 harm?
15 MR. BENOWICH: It's up to, Your
16 Honor.
17 THE COURT: Now the issue of
18 irreparable harm, as I understand part
19 of that argument that when the
20 Conservancy was given the land Oregon
21 Road was a public road and therefore the
22 nature of the land that was given or
23 nature of the Conservancy at the time it
24 was established took into consideration
25 a public road running through it and

1
2 re-opening the road would have the
3 affect of reverting the nature and
4 character of the land to that which it
5 was original. Is that basically the
6 argument?
7 MR. DONNELLAN: Yes, Your Honor. It
8 was a public street when they got their
9 deed in 1973 and again the conveyances,
10 I know we bluster over the fact that
11 they may own that portion of Oregon Road
12 but their descriptions do not expressly
13 give them Oregon Road. They didn't get
14 a deed that included all of Oregon Road.
15 They got a deed that had two parcels on
16 it that made reference to their boundary
17 running along Oregon Road. Oregon Road
18 was then a public street. For the same
19 reason we claim a right to the bed of
20 the road to the center line thereof. I
21 presume they do. Their meets and bounds
22 description is approximately anywhere
23 from thirty to fifty feet a part. There
24 is a space there. If you survey their
25 property it's missing that thirty,

2 forty, fifty feet. Their boundary is on
3 the side of Oregon Road, not covering
4 Oregon Road. It was a public street at
5 the time. Because they have the
6 impertinence street clause which gives
7 them the right to the center line. They
8 now claim ownership to that road is
9 because they had an impertinence clause
10 giving them ownership to the bed of that
11 public street. The description in their
12 property does not give them the
13 conveyance of that public street.
14 THE COURT: That goes back to
15 likelihood of success.
16 MR. DONNELLAN: It does. But it also
17 relates to what they have. It was a
18 street at that point in time. I know we
19 want to focus on irreparable harm.
20 There is a restriction on their property
21 that they will argue that keeps it as a
22 Nature Conservancy. That is all fine
23 and dandy.
24 THE COURT: Is there a reverted
25 clause as well?

2 MR. DONNELLAN: In their restriction,
3 I don't know.
4 THE COURT: Is there a reverter
5 clause that if you don't use it it goes
6 to somebody?
7 MR. BENOWICH: It's a separate
8 simultaneous what I call a reconveyance
9 agreement.
10 THE COURT: Who would it be
11 reconveyed to?
12 MR. BENOWICH: It said the
13 Foundation.
14 THE COURT: Does it exist, the
15 Foundation?
16 MR. BENOWICH: I don't know that it
17 does.
18 THE COURT: I'm sorry. Go ahead.
19 MR. DONNELLAN: That was for the
20 property that was conveyed to them.
21 When it was conveyed to them it had a
22 public street. Obviously the grantor in
23 that case could not be restricting that
24 public street to use as a Nature
25 Conservancy, it ran through the middle

2 of it. The description ran up to it.
3 It's only the impertinence clause that
4 gave them rights to the public street.
5 It's not taking anything away from them.
6 What the original intention was the
7 conveyance they got or any use that they
8 have.
9 THE COURT: If I don't grant the
10 injunction at this point, how far can
11 Seven Springs go in the use of the road
12 and what would be ultimately -- I know
13 your papers indicate even if allowed to
14 use it no one is going clear cut
15 property, we can't cut trees, we need
16 permits, we can't pave roads. So we're
17 asking for the ability to basically
18 drive over that road and do minor
19 maintenance as needed. Apart from
20 actually changing the character of the
21 land whether it's by flattening it,
22 clearing it, moving the streets into
23 wetlands, wouldn't the nature of having
24 traffic, I'm not sure how much traffic,
25 is it limited to Mr. Trump coming in and

2 out or all of his friends on the weekend
3 to come up and go quadding in the woods?
4 What is the argument against the
5 irreparable harm?
6 MR. DONNELLAN: Good point. Not
7 clear cutting, not throwing stuff into
8 the wetlands, I'm not conceding that
9 happened. I frankly don't know. None
10 of that should happen. I concede that
11 the character of the road should not
12 essentially change and nothing should be
13 done to their property, nothing should
14 be done to disturb their property on the
15 side of the road and nothing should be
16 done to make improvements to this road
17 that would pave the road or even flatten
18 it any further or anything like that,
19 the little bit of maintenance done in
20 terms of pulling up weeds is done. It
21 would take years to overgrow again. I
22 don't think it's a big deal.
23 As far as the gate is concerned, my
24 client wants the gate there. It's a
25 private road. We have not built any

2 roads yet and we haven't made
3 application to build those homes and
4 it's years and years away. I'm only
5 talking about, I would perceive us
6 having the right to bring vehicles down
7 there for surveying purposes, for my
8 client and professionals to be able to
9 use a vehicle to come on to the road, to
10 access the property from that end if it
11 need be for a service vehicle, in terms
12 of future planning for that property,
13 engineers, architects, my client being
14 able to go on the road, not for public
15 traffic.
16 THE COURT: I would hope this
17 matter is resolved sooner rather than
18 later so the ultimate resolution will
19 deal with those issues.
20 In dealing with the issue of the
21 preliminary injunction what is the
22 planned immediate use such that there is
23 an objection to maintaining status quo
24 and if I were to entertain an injunction
25 that had some kind of middle ground,

2 what is it your client would like to do
3 or needs to do in the seven or eight
4 months it may take to resolve this
5 action?
6 MR. DONNELLAN: Good point. There is
7 a disconnect as to what we would want to
8 do. It's very limited. For now they
9 may do nothing. Six months from now
10 they may have surveyors on the property
11 and maybe take vehicles out for that.
12 The roadway should not be blocked in
13 anyway. The gate at the bottom is fine,
14 that keeps the public from dumping
15 there. We don't want the public
16 traversing up the roadway and making a
17 mess of their property or ours. We
18 don't want the public going up there.
19 There are certain maintenance people or
20 owners that live on the property where
21 Mr. Trump lives in the residence at the
22 top that should have access to it.
23 We're not talking about major traffic
24 and we're talking about probably not
25 daily. It would probably be service

2 people to come in and look at surveying
3 the property and feasibility of making a
4 plan there which we have not started to
5 do there.
6 THE COURT: You talk about people
7 going in to survey, given the existence
8 of macadam drive, would prevent them
9 from driving down macadam drive and
10 walking down the road, surveying
11 equipment is not that large, a tripod on
12 your shoulder, you do what you need to
13 do, unless it's a six or seven mile
14 hike.
15 MR. BENOWICH: It can be measured in
16 hundreds of feet, Your Honor.
17 THE COURT: I don't like the word
18 balancing of the equities, balancing
19 implies they are even but a weighing.
20 MR. DONNELLAN: It's not irreparable
21 harm to my client, it's irreparable harm
22 to them. What irreparable harm would
23 they suffer by my client driving a
24 vehicle down that road?
25 THE COURT: They will get to that

2 argument. If he needs to do something
3 before the issue is resolve. He can't
4 pave. He would need separate permits.
5 He can't cut. He has access to the
6 property in other ways.
7 MR. DONNELLAN: It's limited. The
8 property is a very big piece of
9 property. Access from one side of the
10 property doesn't necessarily allow easy
11 access from the other side.
12 THE COURT: Does he live there
13 fulltime?
14 MR. DONNELLAN: He does live there.
15 I don't know about fulltime. He has
16 several residences. He does spend time
17 there. At some time there will be a
18 development on the Bedford side.
19 THE COURT: I would hope this
20 matter to be resolved.
21 MR. DONNELLAN: The timing is such we
22 would expect to get approvals in Bedford
23 in the next couple of months. Maybe in
24 six or seven months they could start
25 construction up on that end. It is

2 going to affect access on the other
3 side. It would make a difference rather
4 than driving through a construction site
5 for whoever living on the residence on
6 this side of the property.
7 THE COURT: There would be no
8 irreparable harm given the limited use
9 you could make of the property.
10 MR. DONNELLAN: It would be limited.
11 THE COURT: A weighing of the
12 equities and other affirmative issues,
13 do you want to touch upon briefly.
14 Let's address the weighing of the
15 equities.
16 MR. DONNELLAN: One more point on the
17 property, counsel has raised the issue
18 in their reply brief about that the
19 easement can't benefit after acquired
20 parcels. I don't believe that's an
21 issue on this application. It's true
22 that Seven Springs acquired some other
23 property from other grantors. That's
24 adjacent to the Seven Springs property.
25 It's off the map. But it's the parcel

2 that we're talking about that has the
3 max on it. The original part we need.
4 The other parcel in Bedford would be
5 serviced by the other side of Oregon
6 Road. I don't think it's an issue
7 because parcel is far removed and
8 whether or not that could be benefited
9 from this doesn't change the fact this
10 could be benefited by it.
11 On the abandonment issue it is their
12 burden of proof. They have to prove by
13 clear and convincing evidence and it's
14 something that is not favored in the
15 law. We cited those references. Court
16 of Appeals in Gerbig versus Sumbano is
17 cited in our memorandum indicated it
18 must be by permanent relinquishment.
19 The only thing they really reference in
20 terms of facts are that Rockefeller they
21 believe consented to the installation of
22 the gate. That consent is not evidence
23 of a permanent relinquishment of the
24 road. We even want the gate there.
25 Right now it's a very private road and

2 you don't want general public going up
3 that road as apparently was done in the
4 past.
5 THE COURT: The Appellate Division
6 held as a matter of law, as a matter of
7 law, the closing of the public road
8 doesn't extinguish a private easement.
9 Can't one consider Rockefeller's stance
10 vis-a-vis the closing of the public road
11 as some intent with respect to the
12 abandonment issue not that the closing
13 of the public road as a matter of law
14 extinguishment easement but somebody
15 with the means to object an attempt to
16 stop the closing of the public road, I
17 don't know if there is any evidence that
18 he in fact acquiesced, agreed,
19 recommended but the fact that here's an
20 individual who has a public road that
21 traverses his property certainly has the
22 means to attempt to stop the town of
23 closing but allows not only a gate to be
24 put there but the public road to be
25 closed while not dispositive as a matter

2 of law extinguishing the implied
3 easement, can it be seen as some
4 evidence on the abandonment issue?
5 MR. DONNELLAN: I don't think so. If
6 you look at the circumstances of the
7 road, it goes up to a private estate.
8 The fact that you cut it off to the
9 public is a good thing. You don't want
10 the public going up that road. Maybe if
11 you were going to develop it. That
12 doesn't mean he was giving up his
13 private easement. He has a driveway
14 that goes out the back of that mansion.
15 THE COURT: Macadam road.
16 MR. DONNELLAN: No, that goes up to
17 the driveway that goes to the house.
18 There is no intention or any facts that
19 I can see or even been alleged to show
20 an intention let alone a clear
21 intention.
22 THE COURT: Do you know when that
23 was created, is that created by the
24 current owner or did it pre-exist the
25 purchase of the property?

2 MR. DONNELLAN: From the maps I've
3 seen it appears it's been there a long
4 time. I think it was there before my
5 client bought the property.
6 THE COURT: It may be something
7 that goes to the intent issue.
8 MR. DONNELLAN: Maybe but in this
9 case and on this motion it's their
10 burden to prove a likelihood of success
11 on the abandonment issue. It's their
12 burden to prove it by clear and
13 convincing evidence and I have not
14 submitted anything other than saying
15 Rockefeller consented to closing the
16 public road and consented to the
17 installation of a gate. Assuming that
18 is true that alone, there are no other
19 facts, there is no showing of the
20 abandonment. There is a severe lack of
21 evidence on their part to prove a
22 likelihood of success on the merits.
23 The gate issue ties into that. It's
24 inconsistent to allege adverse
25 possession if you say Rockefeller

2 consented to the installation of the
3 gate. Adverse possession claim they
4 have to show several things open and
5 hostile, they have to show enclosed by a
6 substantial enclosure.
7 THE COURT: I don't want to spend
8 too much time on that. It's one of the
9 few areas discussing here I don't think
10 I have any doubt in my mind as to the
11 understanding of the law or the elements
12 that have to be shown and I'm not sure
13 it's one of the stronger arguments. The
14 cases that have been cited, I'll have
15 you address it, do any of them deal with
16 adverse possession in the context of an
17 implied easement case? It seems to me
18 they are all cases cited to go through
19 the factors. It almost belies the
20 entire principle of adverse possession
21 and going to the one of the first
22 factors is you have to assert a claim of
23 right to various property. The disputed
24 portion of Oregon Road that was focused
25 on last week, there is no doubt that the

2 Nature Conservancy owns, if you own the
3 property and no dispute about whether
4 you own it or not, I'm not sure how you
5 can extinguish an implied inference by
6 adverse possession. It usually means to
7 acquire property you don't own. I
8 didn't mean to cut you off. I would
9 rather have your adversary discuss it.
10 MR. BENOWICH: Let me start with
11 adverse possession. The cases talk
12 about taking an easement from a dominant
13 estate by adverse possession. That's
14 what all the cases are about. From
15 Siegel to the rest of them.
16 THE COURT: Express or implied.
17 MR. BENOWICH: It doesn't matter. If
18 the location of the easement is
19 identifiable, we know where it is then
20 they have years by which they have to
21 challenge the open and notorious conduct
22 and there is no question that it
23 happened here. In 1990 the town put up
24 the gate. The gate was locked. The
25 evidence of that is the certificate

2 which under CPLR is prima facia evidence
3 of what is stated in there. What is
4 stated in there also is that Rockefeller
5 consented because they recite
6 Rockefeller had the alternative access,
7 through what Mr. Donnellan refers to as
8 the northern route. Even later than
9 that, in 1995 when his current client
10 bought this land, the gate was there.
11 You couldn't drive passed it. And
12 Rockefeller didn't have the key and his
13 client hasn't had the key ever.
14 THE COURT: I will have to read
15 these cases. Doesn't the argument in
16 the context of the implied easement
17 almost turn adverse possession on its
18 head? You are not saying that you
19 possess or gain possession over
20 something you don't otherwise possess,
21 you say because Rockefeller and talking
22 to Rockefeller Trump didn't do anything,
23 it's not that we adversely possessed
24 their property and therefore now own it,
25 they abandoned their implied easement by

2 not doing something. Assume everybody
3 agreed there was no implied easement but
4 nobody had a need to use it. What would
5 you have somebody who has an implied
6 easement do? It may be beneficial to
7 have the public excluded from that road.
8 It may be beneficial to have a gate and
9 lock put up such that the public can't
10 drive up there. What would you have
11 somebody do to negate the subsequent
12 argument of adverse possession?
13 MR. BENOWICH: Because Mr. Donnellan
14 has advanced really inconsistent
15 theories. His client and he are here
16 saying they have an easement over Oregon
17 Road because it's a public highway,
18 public road. They don't want anybody
19 else but themselves on the road. They
20 want it locked. Right now they are
21 happy that the town alone has the key.
22 What I would say if Your Honor's
23 hypothetical were true then the dominant
24 easement holder in this case, either
25 Rockefeller University or Seven Springs,

2 would have a key so that they could in
3 fact have access over the right of way
4 they had claimed but that is not the
5 circumstance.
6 THE COURT: Doesn't that go more to
7 an abandonment argument?
8 MR. BENOWICH: Either way. We raise
9 abandonment or adverse possession
10 because one or the other is going to be
11 sufficient to extinguish the easement.
12 Either Rockefeller gave it up and said
13 keep the key, I don't need it, we got a
14 mansion, we go up towards the lake.
15 Either they abandoned it-- we don't know
16 what the contract from Rockefeller to
17 Seven Springs says.
18 THE COURT: What contract?
19 MR. BENOWICH: The contract of sale
20 of the property from Rockefeller to
21 Trump. I don't know what it says about
22 what they had, what they didn't have.
23 We don't know if they said anything, by
24 the way, we consented to the gate going
25 up.

2 THE COURT: A separate contract?

3 MR. BENOWICH: A contract of sale.

4 There might be something in there. To

5 answer Your Honor's question on adverse

6 possession, if Rockefeller had not

7 abandoned, if there was no evidence of

8 their consent which the certificate from

9 the town evidences then there is a

10 locked gate that goes the entire width

11 of the way. I've walked it. I imagine

12 everybody here has walked it. The only

13 way you get there is by climbing on a

14 rock around the barrier. You have to

15 carry a bicycle if you can. You can't

16 get a vehicle through that gate. If

17 that's not open and notorious then the

18 Appellate Division reference to the

19 McKinnely case is deceptive. At the end

20 when they say we did not establish

21 adverse possession as a matter of law

22 for the length of time needed they cited

23 McKinnely against Postal, what that case

24 dealt with was an easement where

25 boulders, removable boulders, boulders

2 that had been removed were not held as a
3 matter of law to constitute a sufficient
4 interference to give rise to adverse
5 possession and the loss of an easement.
6 This case is different. You can't move
7 the barrier. You can't unlock the lock
8 without defacing and destroying it.
9 It's not like leaving a boulder there
10 which by natural means can be moved.
11 That's the adverse possession.
12 Let me go back to the easement
13 issue, back to the merits.
14 THE COURT: To Holloway?
15 MR. BENOWICH: Yes. Only one
16 sentence in Holloway. Holloway says the
17 whole purpose is a rule of construction,
18 we want to find out, as they quote, the
19 right is inferred from the great
20 principle of construction that every
21 grant and covenant shall be so construed
22 as to secure to the grantee the benefits
23 intended to be conferred by the grantor.
24 What we have -- that is carried through
25 in many cases from the Court of Appeals

2 in our reply brief we quote from the
3 Court of Appeals 1932 decision in the
4 matter of the City of New York referred
5 to by the Second Department in 1996, the
6 point being that when interpreting
7 whether an easement is granted in the
8 first place, not whether the later
9 closing of a public road destroys it,
10 the main factor to be considered is the
11 intent of the parties to the grant,
12 taking into consideration the
13 circumstances attending the transaction,
14 the particular situation of the parties,
15 the state of the country and state of
16 the thing granted. That could not be a
17 more broad comprehensive direction to
18 Your Honor that you have to take into
19 account all the surrounding
20 circumstances. It would be wrong and
21 it's certainly not required and I don't
22 think permitted by New York law for Your
23 Honor in this case to ignore the fact
24 that it was a Foundation that gave land
25 to Yale University and to the Nature

2 Conservancy and the uses to which that
3 land was put at that time.
4 Your Honor, Mr. Donnellan very
5 definitely side stepped Your Honor's
6 question as to the intent of the grantor
7 in 1973 when he referred to his client's
8 current intention to develop the land.
9 It cannot be that in 1973 when the
10 Foundation gave Yale the mansion and 200
11 acres for a study center and the
12 Conservancy 200 some odd acres for a
13 nature santuary that they intended for
14 it to be developed as homes or a parking
15 lot. Yet, what counsel is saying they
16 have the right to do is to build a
17 parking lot in the middle of the Nature
18 Conservancy. That simply cannot have
19 been the intent of the grantor and it
20 was certainly not taking into account
21 the particular situation of the parties
22 or state of the thing granted as the
23 Court said in the Matter of City of New
24 York.
25 The question is whether an easement

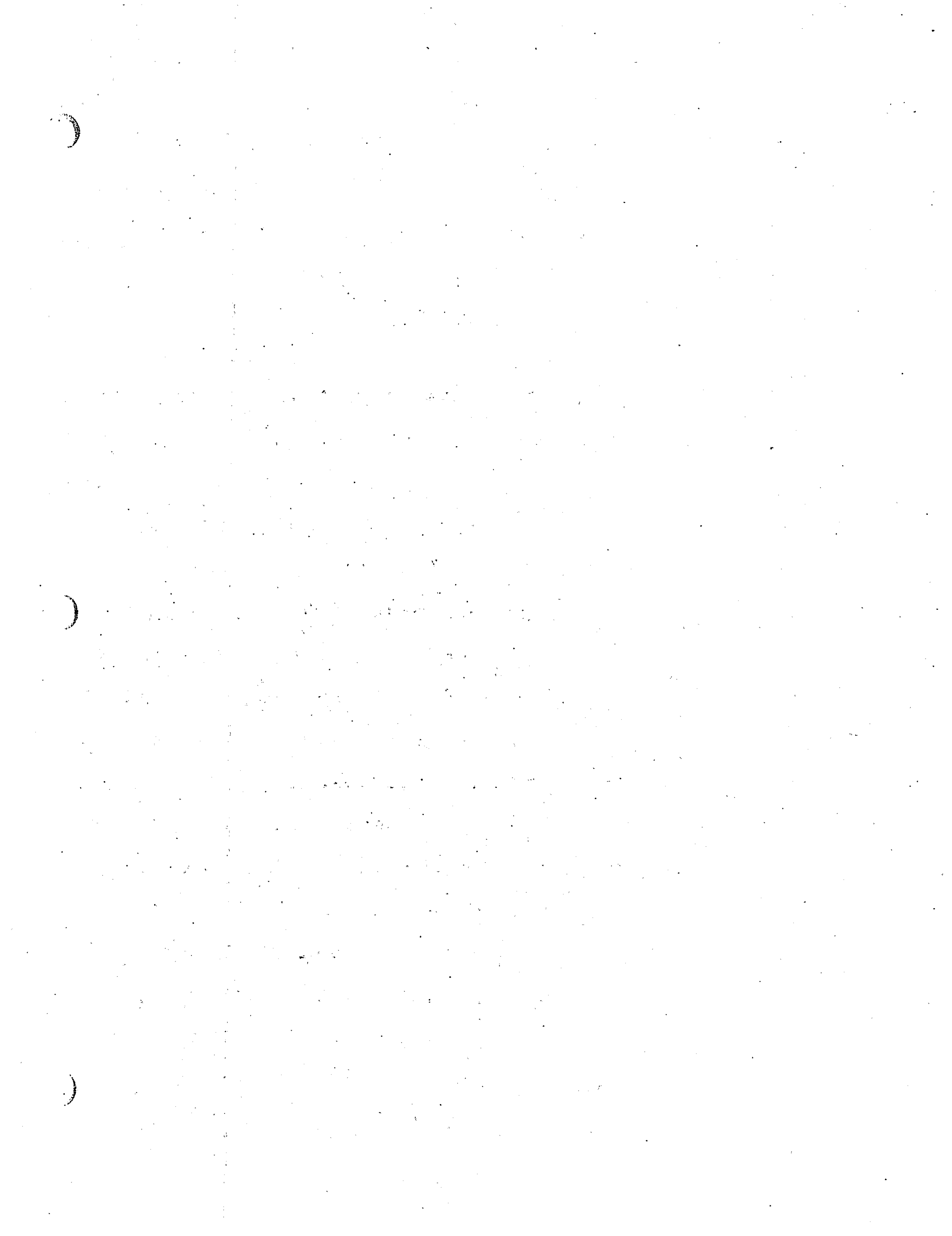
2 was created, not whether the destruction
3 of the public easement also destroyed a
4 private easement. We know the answer to
5 that. The question is whether the deeds
6 and surrounding circumstances given the
7 rights he claims, we don't believe he
8 does. We think there is a very big
9 question and it's his burden ultimately
10 to prove by clear and convincing
11 evidence that he has an implied easement
12 and just as he was correct in saying
13 that abandonment and adverse forfeitures
14 are not favored, neither are implied
15 easements. So he has the same burden
16 that we do in terms of that.
17 THE COURT: This is where the
18 papers started until the assertion you
19 amended the answer, given this is a some
20 what -- given the nature of your action
21 for an injunction which is somewhat
22 different than most where plaintiff
23 comes in and starts a cause of action
24 and argues we want a declaratory
25 judgment with respect to certain

2 property and we need a stay in the
3 interim because they are going to
4 forever harm our property, is there
5 almost an argument being made here that
6 by arguing they are not going to be able
7 to prove their case, you've demonstrated
8 that you are going to succeed in your
9 case. Because you didn't commence the
10 action, usually when you talk about a
11 likelihood of success on the merits it
12 refers to the individual who commences
13 the action is likely to succeed. The
14 argument seems to be turned on its head,
15 as a matter of law they are going to
16 have difficulty, given their burden is
17 clear and convincing, of convincing a
18 Court in the declaratory judgment
19 action. As of their failure to prove
20 their case then we will succeed on our
21 case.
22 MR. BENOWICH: Both. They will not,
23 in our view for reasons I've
24 articulated, I think be able to convince
25 the Court by clear and convincing

2 evidence that they got the easement in
3 the first place they claim they have.
4 Therefore, we don't have to get to
5 whether we have a defense. Even if they
6 are likely to prove that, and I don't
7 think they are, the evidence on the
8 extinguishment of that easement be it
9 abandonment or adverse possession is
10 sufficient at this point to raise a
11 question about whether any easement they
12 had still survives at this time to allow
13 them, Your Honor, to do something they
14 have never taken the position they need
15 possession, they need to or wanted to
16 before. Since 1990 Rockefeller never
17 did this. No claim since Seven Springs
18 acquired the property in 1995 that it
19 ever before took steps as Mr. Donnellan
20 said to do maintenance as needed. What
21 maintenance has been needed and why?
22 They don't have a clear right to an
23 easement. They don't have any need to
24 groom the hiking trail. As he clearly
25 told you based on his own discussions

2 with his client and nothing from them,
3 there are no current plans to do
4 anything with this land or this way.
5 They may have something later probably,
6 possibly, other people may want to come
7 down. That's not what we're talking
8 about now. Right now about whether the
9 plaintiff has the rights it claims or
10 whether it doesn't or whether if it had
11 them it's lost them, shouldn't what we
12 know to be a nature sanctuary be left in
13 the condition it has been since at least
14 the plaintiff acquired the property in
15 1995 at least that long and at least as
16 long as the locked gate it has no
17 control has been there. Leave things as
18 they are. If they want to walk there,
19 they can walk there. I don't know why
20 they need four wheelers or why they need
21 to have a rip roaring party down on
22 lower Oregon Road. There is no need for
23 it. We want to file an application so
24 we need a survey, trucks. It is a
25 Nature Conservancy. And it was a Nature

2 Conservancy in 1995 when the plaintiff
3 bought the land and as Your Honor found
4 when you went back to read Holloway the
5 plain site of the land and the way was
6 there. The gate was in plain sight.
7 They have never in 13 years except for
8 the commencement of this action tried to
9 take down the gate or said get rid of
10 the gate. They want their cake and they
11 want to eat it. They are happy the gate
12 is there so long as they come to you and
13 say we alone want to have passage.
14 THE COURT: Is there any precedent
15 where courts in these types of matter
16 rely on equitable estoppal argument to
17 prevent him from asserting the right of
18 an implied easement? If you don't reach
19 the abandonment as a matter of law or
20 adverse possession is there any
21 precedent to say along the lines of the
22 abandonment, although we can't show as a
23 matter of law Rockefeller abandoned it,
24 we don't know whether he kept a key or
25 not, you would expect the owner to do



2 everything he did with the property,
3 maybe he should be equitably estopped he
4 has an implied easement fifteen years
5 after he buys the property.
6 MR. BENOWICH: I'm not going to stand
7 here and say I know that for a fact.
8 The cases are clear that there are
9 certain ways to extinguish an easement.
10 They are by abandonment merger, adverse
11 possession, a forfeiture that requires
12 we recognize a clear and convincing
13 threshhold, it does not require evidence
14 as a matter of law. You do not need, we
15 do not need to prove our claim, a
16 document signed by John D. Rockefeller
17 or David Rockefeller saying we have no
18 intention and we give up any and every
19 effort or desire now or in the future to
20 go through that little passage way. We
21 don't have to do that. We have to show
22 clear and convincing evidence. The
23 certificate at this early stage of the
24 case, other than the 3211 motion, this
25 case is two months old. There has been

2 no discovery. We know that the town
3 closed it with the stated consent of
4 Rockefeller. We know Rockefeller didn't
5 have a key. We know plaintiff doesn't
6 have a key because they would have told
7 you that they do. So at this stage of
8 the case, we do know the statements they
9 made to other planning boards that they
10 had no rights over Oregon Road. While I
11 think it's important, I'm not going to
12 say that Your Honor ought to or even can
13 say that an estoppal which hasn't been
14 accepted by another Court. If they had
15 been in Court and took the position that
16 they have no right over Oregon Road and
17 a Court gave them relief of some form
18 based on that I think that would be an
19 enforceable estoppal against the
20 position. That's a judicial estoppal.
21 I don't know the easement per se can be
22 extinguished in the way Your Honor
23 asked.
24 We are here at a preliminary
25 injunction stage. The first time the

2 use of the land has changed was this
3 past month or so, and that's powerful.
4 Because they don't deny they went on the
5 land. They don't deny what they did.
6 They don't deny it was done on our land
7 and they don't tell you they need to do
8 anything else. They tell you they don't
9 think they need to do anything else but
10 we want the right to do whatever we want
11 without an order of the Court. They
12 brought the matter into this Court.
13 They must abide the Court's
14 determination as will all parties. They
15 asked the Court to say they do or don't
16 have a right and they have acted in
17 defiance of their request that you make
18 the determination. That seems to me is
19 why the Court has to grant the
20 injunction and I don't think that there
21 is irreparable harm or any harm on their
22 behalf. We don't know what they are
23 going to do on our land and because they
24 might change the nature of the land,
25 that is as a Nature Conservancy and

2 sanctuary that's to be prevented.

3 THE COURT: How would the harm be

4 irreparable assuming they don't pave,

5 they don't cut trees, assuming it's a

6 matter of a surveyor driving down the

7 property once in April and once in May

8 and the owner is sneaking in the back

9 way, I use that -- I'll withdraw

10 sneaking, maybe using the back entrance

11 twice over the summer.

12 MR. BENOWICH: Right now he has no

13 right to use that entrance, he doesn't

14 have a key to the gate. He can't drive

15 down there. If his surveyors want on

16 foot to take their tripods and look

17 around, they can do that without

18 violating Your Honor's current order.

19 THE COURT: Where is the

20 irreparable harm?

21 MR. BENOWICH: In doing anything to

22 the land is just that. It is a nature

23 preserve and sanctuary. It is to be

24 maintained in its wild state. That is

25 the grant to us, that's a condition of

2 the grant to the Nature Conservancy and
3 that's the only use for the land.
4 THE COURT: What about the argument
5 that when the Conservancy was created
6 there was a road, so the nature of the
7 Conservancy existed with a public road
8 driving right down the middle?
9 MR. BENOWICH: I wasn't there in 1973
10 but in 1995 -- since 1990 there has been
11 a gate and there has been no traffic.
12 Why does it have to change now eighteen
13 years later to go back to a state of
14 time which doesn't give him anything he
15 needs today. Plaintiff only says at
16 some point years later we are going to
17 have plans for this land. Why do they
18 have to do it now? Why do they have to
19 have a rumble in the nature preserve
20 now? They want to walk with surveyors
21 and tripods, it doesn't violate your
22 order. As long as they don't pull up
23 vegetation, they don't violate it. They
24 can't drive vehicles on it and they
25 can't pull vegetation. Leave nothing

2 but tracks take nothing but memories.

3 That's what a nature preserve is.

4 THE COURT: The harm then in

5 addition to being irreparable vis-a-vis

6 the land itself, opening it up to

7 vehicular traffic at the discretion of

8 Seven Springs or the owner of the

9 property would change the nature of the

10 Conservancy such that those who use it

11 would be less inclined to hike on the

12 road, walk on the road, picnic on the

13 road because cars can come down.

14 MR. BENOWICH: I can't say, no one

15 has made any statement as to the last

16 time a car other than maybe a Con Ed

17 service truck has been on that road. I

18 don't see anybody needs to have it or

19 claims to or wants to go back to a point

20 where that was the case. To some extent

21 it is there for everyone to enjoy and

22 for another it is simply, despite the

23 wealth of the owner of Seven Springs,

24 I'm not here to challenge that, altering

25 the natural state of the land is

2 simply-- that cannot be compensated for
3 by money. You can't. You pull up
4 vegetation, you affect the erosion. You
5 throw things into wetland, you affect
6 wetlands. You cut down trees, you can't
7 put back a tree. You change the nature
8 of the environment. And that's what we
9 ought to be preserving and preventing
10 until Your Honor reaches a final
11 determination on the merits.
12 THE COURT: The issue with respect
13 to posting of a bond, that was raised.
14 MR. BENOWICH: We agree the statute
15 is clear. If Your Honor were so
16 inclined to grant an injunction without
17 a bond I would be in the position to
18 post a nominal one. You do have to
19 require an undertaking. It doesn't have
20 to be dramatic as we pointed out. It
21 doesn't have to reflect the values of
22 homes unpermitted. That's a separate
23 action. So what's the harm? What's the
24 damage? What's the value or damages
25 that Seven Springs will suffer if they

2 can't have a truck having a party on
3 Seven Springs on the road on a Sunday?
4 I think it's nominal.
5 THE COURT: During the course of
6 this proceeding, if a judge doesn't hold
7 there is an implied easement that's a
8 different story. If I were to grant the
9 injunction, how would you have me
10 calculate given that there are no plans
11 pending, the action for declaratory
12 judgment wouldn't prevent you from
13 applying for permits or seeking to
14 pursue a project at least in the
15 planning stage, what kind of damages
16 might you suffer if I'm wrong in
17 granting the injunction over the course
18 of let's say the next twelve months
19 assuming it's resolved in your favor,
20 what would be the nature of damages?
21 MR. DONNELLAN: It's not having
22 access to a very valuable piece of
23 property from that end of town. As I
24 explained before, the Bedford side is
25 going to be developed in the near

2 future. That development is not
3 necessarily consistent with the mansion
4 that's there which is closer to the
5 North Castle side. The residence there,
6 not having access that way, up until
7 this point in time and the development
8 going forward in Bedford may not have
9 been as important in the past as it's
10 going to be over the course of the next
11 year.
12 THE COURT: Where are you in the
13 Bedford development?
14 MR. DONNELLAN: They are in the final
15 stages of accepting the SEQRA.
16 THE COURT: And permits will be
17 issued thereafter. Assuming there is no
18 challenge to that, building could
19 commence within --
20 MR. DONNELLAN: The next six months.
21 THE COURT: Ownership wouldn't take
22 place for at least another six months
23 after that.
24 MR. DONNELLAN: Once it's subdivided.
25 That's the other thing. What if we want

2 to sell the property. We could sell
3 that property, subdivided property to
4 some other developer who wouldn't be
5 able to do that.
6 THE COURT: This is my question, I
7 wonder why folks do not consent, suppose
8 I don't grant the injunction. You
9 subdivide and ultimately I hold that
10 there is no easement implied, express or
11 otherwise and I'm affirmed on appeal.
12 Your client builds and then no access to
13 the property.
14 MR. DONNELLAN: That subdivision is
15 in Bedford. I'm not saying you couldn't
16 have the access to still come through
17 our existing property. The problem you
18 face is you will not be able to build
19 anything on it because we've limited the
20 subdivision there to the number of homes
21 that are permitted. Even that's a push
22 because you don't have secondary access.
23 Bedford is concerned about the safety of
24 those homes on the deadend street.
25 MR. BENOWICH: What counsel just said

2 is exactly what Your Honor just posed.
3 These are circumstances of his own
4 creation, his own intention to split up
5 his land. It's not a product of the
6 injunction. It's a product of what he's
7 trying to do in Bedford.
8 THE COURT: We'll take a brief
9 luncheon break now.
10 (Court adjourned for a luncheon
11 recess at this time.)
12 A F T E R N O O N S E S S I O N.
13 THE COURT: So the record is clear,
14 plaintiff and respondent in the order to
15 show cause action had given me a copy of
16 some pleadings before my clerk pulled
17 cases on pages 23 and 24, can you
18 identify that document for me, was that
19 one of your original memos.
20 MR. WANK: That was the order to
21 show cause with supporting affidavit.
22 THE COURT: With the matter of the
23 application of the City of New York
24 Widening of Sedgewich Avenue 213 New
25 York, 438 and continue thereafter, I

2 pulled those, I reviewed those.
3 Certainly the principles annunciated
4 therein are pertinent to the underlying
5 action. I didn't find them to be much
6 use with respect to this issue in
7 granting the preliminary injunction,
8 whether to grant it or not. I had the
9 opportunity during the hour to do some
10 research on this issue in addition to
11 what I've done, one of the things I
12 found that is consistent in the case
13 law, I'll cite a case, it's not for the
14 proposition that it's controlling,
15 Appellate Division Third Department
16 Beretz vs. Diehl 302 AD2d, 808. Stands
17 for the general proposition that implied
18 easements are not favored in the law.
19 The burden of proof rests with the party
20 asserting the existence of facts
21 necessary to create an easement. In
22 this case it was by implication to prove
23 such entitlement by clear and convincing
24 evidence. This case went on to talk
25 about establishing an easement by

2 implication by pre-existence use. Three
3 elements must be present. Obviously
4 it's a different kind of easement. The
5 easement being sought in this case stems
6 from the Holloway decision, it's not an
7 easement by implication. It's not an
8 easement by prior use. I don't even
9 know it's an easement, a pertinent. The
10 case law I found, none of the cases were
11 exactly on point. Many of them talk
12 about prior use establishing an
13 easement. Subdivision maps and/or plots
14 establishing an easement, specific
15 grants. In this case the respondent in
16 the order to show cause plaintiff in the
17 underlying action relies on Holloway.
18 In Johnson vs. Cox which is a Court of
19 Appeals case from 1909 at 196 New York
20 110, the Court summarized, the Court of
21 Appeals attempted to summarize or
22 clarify the issue in Holloway and
23 perhaps did it better than I could, so
24 I'll read from that decision. Discuss
25 the case of Holloway wherein a state of

2 facts was presented by no means so clear
3 and convinces as those at bar. The
4 context grew out of the closing of the
5 Bloomingdale Road. This road was opened
6 as a public highway in 1707. The fee of
7 the same remaining in the abutting
8 owners. In 1799 others conveyed a
9 certain track of land abutting on
10 Bloomingdale Road to Clarkson in which
11 conveyance description began on the
12 north side of Bloomingdale Road and
13 running along the same. The grantors
14 included in this conveyance all the
15 easements, privileges, advantages and
16 pertinences belonging or in any wise
17 pertaining to the land. Plaintiff
18 although is a decedent of the original
19 grantor and he claimed by inheritance he
20 was entitled to and seised in fee
21 certain portion of the land formally
22 within the lines of the Bloomingdale
23 Road. Holloway brought an action of
24 ejectment as a successor in interest to
25 the fee against the successor in

2 interest to the lot conveyed on the
3 ground that law 1867, page 17 48 C 697,
4 which closed Bloomingdale Road to the
5 public, gave to the plaintiff the right
6 to use the fee in the street free from
7 any private or public easements. The
8 courts stated Judge Gray writing, it
9 quotes from Holloway, I believe the
10 Court here references Holloway solely
11 for the extinguishment of a public road
12 does not extinguish private easements.
13 That's what Holloway goes on to say. It
14 was not clear from my reading of
15 Holloway, in summarizing Holloway, it
16 mentions that in the Holloway case the
17 grantors included in the conveyance
18 easements, privileges and advantages.
19 There were easements that were expressed
20 more than necessarily implied based on
21 the Court of Appeals summary of the
22 case.
23 I'll briefly read from New York Law
24 Practice Real Property, data base
25 updated June 2007, update prepared by

2 the Honorable Robert Dolan, section 1833
3 implication from conveyance bound by
4 street. Where a conveyance of land
5 calls for a way or street as a boundary
6 and the grantor owns the fee and the
7 land represented as the way or street,
8 the grantor will generally be estopped
9 to deny that it is a way or street and
10 an easement therein as a means of
11 ingress and egress to and from his land
12 thereon will pass to the grantee by
13 implication. However, to have this
14 affect the way or street must not be
15 referred to as part of a description.
16 It must be designated as a boundary.
17 The fact that the property is described
18 by meets and bounds in addition to being
19 described as bounded by the road, does
20 not render this rule inapplicable. It
21 has been held even though the street
22 mentioned is non-existent in fact and is
23 merely a proposed street. It is
24 immaterial that the road is currently
25 not in use. The implication of the

2 granting of an easement in a road or way
3 to a purchaser of a lot bounded upon it
4 is based upon a construction of the
5 terms of the grant itself and is not an
6 absolute rule. It is the intent of the
7 parties in bounding land and upon a way
8 or street in light of all circumstances
9 which must govern. Running a boundary
10 along a road is only one circumstance to
11 be considered in ascertaining the intent
12 of the parties but it does not require
13 the implication of an easement in the
14 road. Thus a description of a boundary
15 as running along the east boundary of a
16 road does not require the implication of
17 an easement in the road. Although deeds
18 describing the property conveyed as
19 running to or along the side line of a
20 street or way have frequently been held
21 to imply an easement in the granting of
22 the street or way. If the parties
23 intend and understand notwithstanding
24 the description of the property as
25 bounded upon the road or way, that the

2 grantee should not acquire an easement
3 therein, the granting of an easement
4 will not be implied. Obviously if the
5 boundary designated is a public highway,
6 the easement therein is subordinate to
7 the right of the public to use the
8 highway. It goes on to cite various
9 cases it relied on. Anybody wants to
10 read the cases relied on, again this is
11 at one New York Law and Practice of Real
12 Property, section 1833 Second edition
13 NYLPRP section 1833.
14 We know the standards when a Court
15 is asked to issue a preliminary
16 injunction, likelihood of success on the
17 merits, irreparable harm and a weighing
18 of the equitites, balancing of the
19 equities, if they are balanced then they
20 are equal so it would be a weighing of
21 the equities determined in which way
22 they would tip. In this case as far as
23 a likelihood of success on the merits,
24 the sole argument thus far that's been
25 put before the Court by plaintiff in the

2 underlying action and respondent in the
3 current order to show cause is that
4 Holloway, as a matter of law, grants an
5 implied easement in the property. Both
6 language in Holloway and in cases that
7 cite and reference Holloway thereafter
8 speak to rule of construction, speak to
9 ascertaining and determining intent at
10 the time of the original grant. I've
11 seen no cases whether cited by counsel
12 or cases I tried to find on my own that
13 create a rule as a matter of law that
14 mentioning of the roadway creates an
15 implied easement. As I just read from
16 1833 in the Law and Practice of Real
17 Property there is a distinction to be
18 made between a road that is designated
19 as a boundary and property that is
20 described by meets and bounds rather
21 than being designated as a boundary and
22 that would involve questions of fact,
23 intent, a review of the underlying deeds
24 and documents and an attempt by the
25 Court to resolve the intent and way in

2 which those references are used whether
3 they are boundaries or simply a
4 description by meets and bounds.
5 Part of the determination the Court
6 has to make, I said there is somewhat of
7 this action being turned on its head, is
8 the defendant, the movant for the
9 preliminary injunction, in some ways
10 relying on the fact that the plaintiff
11 would be unable at this point to
12 demonstrate a likelihood of success on
13 the merits to show that they would most
14 likely prevail on the merits. I can't
15 say it's an argument without merit. It
16 would seem to me that if in raising the
17 argument at this point in time the
18 plaintiffs are unable to demonstrate
19 that they would prevail as a matter of
20 law then the defendants are likely to
21 success on the merits. I think they've
22 demonstrated by showing that Holloway
23 doesn't necessarily stand for the
24 proposition that the plaintiffs have
25 cited it for. It may be evidence of the

2 creation and it's certainly a case to be
3 relied on in trying to determine whether
4 an implied easement exists. It's not
5 dispositive. I believe the defendants
6 have showed a likelihood of success on
7 the merits at this time. Very difficult
8 in these type of cases because a
9 resolution of the facts may ultimately
10 be in favor of the complainant, Seven
11 Springs. But at this point in time it
12 appears that the defendants are likely
13 to success on the merits given the only
14 argument I've seen put before the Court
15 is that Holloway stands for the
16 proposition that an implied easement was
17 created given the line of case law
18 that's developed and many different kind
19 of easements that exist noting that the
20 Court discussed implied easements are
21 not favored. This is an old case, I
22 agree just because it's from 1893
23 doesn't mean it's not valid. Certainly
24 case law has developed since and with
25 the development of the case law comes

2 additional rules and requirements the
3 Court must follow and the rule of
4 construction and intent of the grantors
5 and grantees at the time of the original
6 grant seem paramount. At the end of the
7 day the plaintiff may demonstrate that
8 there was an implied easement and
9 defendant may not be able to demonstrate
10 the intent was otherwise then set forth
11 in the complaint papers at this point in
12 time it appears defendants are likely to
13 success on the merits.
14 As far as irreparable harm, it's
15 very difficult to limit the way in which
16 the property would be used if the
17 property is opened for the use of Seven
18 Springs, its agents, servants,
19 employees, one cannot guarantee that it
20 will be used in a way that does not
21 cause irreparable harm. Certainly you
22 talk about a Nature Conservancy,
23 although it was a public road at the
24 time the Conservancy was created, the
25 nature of the property has changed since

2 1973. The road has become overgrown.
3 To allow traffic on that road at this
4 point in time would irreparablely damage
5 or have the affect of causing
6 irreparable harm both to the physical
7 property, the land itself and to the
8 nature of the Conservancy. There also
9 is a question as to whether or not the
10 opening of the road would create traffic
11 or a use that would in such a way cause
12 the Conservancy to lose its property.
13 If the land must be maintained as a
14 Conservancy and the Court were not at
15 this point in a position to grant the
16 injunction and the road were used by
17 folks at the invitation or permission of
18 Seven Springs to go in there and to do
19 anything other than simply hike and
20 enjoy the preservation, one could argue
21 that the nature and quality of the
22 Conservancy has been changed and
23 although it hasn't been referred to as a
24 reverter, might cause the Conservancy to
25 lose the property. That would certainly

2 cause irreparable harm and as such I'm
3 making a finding there would be
4 irreparable harm by opening the street.
5 As far as a weighing of the
6 equities, this road is there for folks
7 to walk on, if Seven Springs wants to
8 have engineers walk down that road to
9 survey property with an expectation that
10 ultimately it will prevail, with the
11 expectation it wants to develop
12 property, no reason why the surveyors
13 can't use macadam road and walk down.
14 The Conservancy is open to the public.
15 There wouldn't be any cause of action
16 for trespass or alike. The surveyors
17 would be allowed to walk down that road
18 as like any other member of the public,
19 correct?
20 MR. BENOWICH: I don't know what they
21 would be doing.
22 THE COURT: It's open to the
23 public?
24 MR. BENOWICH: It is open to the
25 public. So long as they honor the

2 posted regulations.

3 THE COURT: That's a different

4 argument. It's open to the public and

5 if someone who is a member of the public

6 violates a regulation they can be asked

7 to leave or perhaps fined or whatever

8 else the remedy is, but it's open to the

9 public in the first instance. In

10 addition there are other ways to access

11 the property on Seven Springs. As far

12 as again a weighing of the equities,

13 there really is no need, no need that's

14 been expressed, no urgency, for the

15 owners of Seven Springs to access the

16 property at this point in time. I

17 understand there is a desire to. I

18 understand there is an argument that

19 they believe they own the property and

20 have a right to use it, then there is a

21 violation of one's property rights every

22 day they can't use the property. That I

23 understand. But as far as a balancing

24 of equities, Seven Springs has owned

25 this property for thirteen years. To

2 say to the best of my knowledge has
3 never used the property as a means of
4 ingress or egress and certainly wouldn't
5 be prejudiced in the amount of time it
6 should take to resolve this action one
7 way or the other. I think a balancing
8 of the equities giving the irreparable
9 harm would tip in favor of the movant
10 defendants in the action.
11 As far as a posting, the law does
12 require some type of posting. Counsel,
13 I'll allow you to be heard as to how I
14 would calculate what would be an
15 adequate bond for me to require to be
16 posted. I know papers request or
17 indicate eight homes were proposed at
18 twenty-five million dollars a piece. I
19 would assume you would want me to do
20 that calculation. I think that comes
21 out to a two hundred million dollar bond
22 that you would request be posted.
23 MR. DONNELLAN: It's obviously
24 difficult because my client if he's
25 ultimately successful, would be

2 prevented from using his property right
3 during the pendency of this case.
4 Frankly, I think that that is
5 irreparable and difficult to calculate.
6 But it's not a nominal sum. Not being
7 able to use a road that accesses your
8 property is a very valuable right. I
9 would suggest maybe it's not two hundred
10 million but it should be at least a
11 million dollars.
12 THE COURT: Educate me, I'm not
13 ashamed to admit it, a million dollar
14 bond, what is the practical --
15 MR. DONNELLAN: The cost to his
16 client is one percent.
17 MR. BENOWICH: Not true.
18 MR. DONNELLAN: His client has
19 substantial assets all over the world.
20 THE COURT: What is the cost of
21 calculating a bond, to your client?
22 MR. BENOWICH: Counsel is talking
23 sometimes with a blue chip company like
24 IBM balance sheet you get a premium of
25 one percent. I have never seen a bond

2 where you didn't have to put up
3 collateral. This is a non-profit. They
4 have assets which are land. They don't
5 have unlimited resources. A million
6 dollars may require a million dollars of
7 collateral in this circumstance. In any
8 event, counsel's attempt to calculate
9 the damage to his client even as he's
10 articulated it, any damage is not the
11 result of this injunction, it's the
12 result of his having commenced this
13 action and asking the Court to declare
14 what rights he's not certain or needs to
15 prove to the town or anybody else he has
16 or doesn't have. That was set into
17 play.
18 THE COURT: I did want to add that
19 as part of my decision with respect to
20 granting the preliminary injunction.
21 I'm not sure where it falls legally with
22 the factors the Court considers, but
23 there is certainly something to be said
24 about a plaintiff bringing an action to
25 declare its rights with respect to

2 certain property and then wanting to use
3 the property before the Court has an
4 opportunity based on discovery,
5 evidence, arguments, perhaps a trial, to
6 grant the request that the plaintiff is
7 seeking. Indeed in this case there
8 hasn't been any use of the land until
9 the Appellate Division reversed LaCava.
10 If it's improper for me to consider it,
11 it's improper. Perhaps it's in the
12 Court's equitable power. It would seem
13 to me if one is commencing an action to
14 have the Court declare it's rights
15 vis-a-vis a piece of property, it's not
16 unreasonable until the action is
17 resolved one not use the property as if
18 it were ultimately and finally resolved
19 that it's their property.
20 If I had a dispute between a
21 neighbor and myself and brought this
22 action alleging I were entitled to use a
23 portion of my property or between my
24 house and my neighbor's, if I wanted to
25 tear down some bushes and I asked the

1
2 Court to issue a ruling that it were my
3 property, I certainly wouldn't ask for
4 that ruling and then go out and tear
5 down the bushes. If you don't think the
6 property is yours, you seek a
7 declaratory judgment action. If you are
8 certain it's yours you would probably
9 cut down the bushes and be on the
10 receiving end of the lawsuit. There is
11 something to be considered about the way
12 in which the lawsuit was commenced and
13 granting the injunction and considering
14 your client has asked the Court to
15 resolve these issues and it's not
16 unreasonable the status quo be
17 maintained until resolved.
18 I have made my ruling, the other
19 factors do weigh in favor of the movant
20 defendant in this case. The law
21 requires a posting of the bond.
22 MR. DONNELLAN: Who started the
23 action I don't think makes any
24 difference. Had we not started the
25 action and we gone and done the work on

2 the road we would still be here today,
3 they would be the plaintiff, we would be
4 the defendant. They would bring a
5 preliminary injunction and their burden
6 would be the same, maybe even worse
7 because it's flip flopped back on to us
8 because we are plaintiffs somehow and
9 now the issue regarding the bond should
10 not be flip flopped to us. If we had
11 not started the action and they were
12 plaintiff they would have the obligation
13 to post the bond and the issue with
14 respect to the posting of the bond is to
15 protect us in case they are wrong and we
16 are right and we have this injunction
17 that prevents us from using a property
18 right. I agree it's hard to put a
19 number but it's not an insignificant
20 number. With respect to the cost of the
21 bond, I've been doing construction law
22 for thirty years, one percent is
23 commonly done. Except for mom and pop
24 contractors that have to put up
25 security, all of my substantial clients

1
2 which have a lot less assets than his
3 client do not have to put up collateral.
4 MR. BENOWICH: The flip flop position
5 of the parties is irrelevant. When this
6 case started, as Your Honor pointed
7 out--
8 THE COURT: I would disagree there
9 is a flip flop. It's somewhat different
10 than most proceedings because in this
11 action the defendant is the one who is
12 seeking the injunction, as in most
13 actions the movant is coming in to stop
14 building and at the same time asking
15 status quo be maintained until the
16 proceeding is over. To say it's a flip
17 flop would be somehow implied that the
18 petitioners have been prejudiced by
19 bringing the action. I don't think
20 that's the case.
21 MR. BENOWICH: There is one more
22 point to make, he hasn't told you what
23 this valuable property right that he
24 claims but hasn't been declared to have
25 allows his client to do. If this

2 property were so valuable why was it not
3 exercised for thirteen years. Since
4 1995 they have not sought to exploit or
5 execute their claimed property right
6 whatever it may be. They have not done
7 that except since the Appellate Division
8 ruling, a time after they withdrew the
9 only project application that related to
10 this property. What this is is another
11 effort to have the Nature Conservancy
12 waste its assets, devote resources to
13 something that is particularly
14 unnecessary. It is selfish, it's in bad
15 faith. Just like the fact that
16 plaintiff has commenced an action for
17 three hundred million dollars in
18 punitive damages and another three in
19 claims compensatory, what's the
20 difference between the damages in that
21 case which apparently have already
22 occurred and what's happening here?
23 There is nothing that is the result of
24 Your Honor's injunction that will cause
25 him harm for which an undertaking can be

2 recompensed. The cases we cited to you,
3 the reason we asked for a nominal bond
4 in the amount of a thousand dollars,
5 each one of them, the Second Department
6 case included, impose a bond of a
7 thousand dollars because it was nominal
8 because it was maintaining status quo.
9 THE COURT: Who?
10 MR. BENOWICH: If you read the cases
11 at the back of our brief, the Kramer
12 case, Second Department upheld an
13 undertaking of a thousand dollars in
14 connection with an injunction against a
15 road widening easement. It's about as
16 close as I could get and it's because
17 they weren't being prevented from doing
18 anything. The plaintiff hasn't shown
19 that it ever did before what it did now.
20 It claims it doesn't have any plans to
21 do it but it has a valuable property
22 right that requires a million dollar
23 bond from the Nature Conservancy. Your
24 Honor, it's just wrong.
25 MR. DONNELLAN: What I submit is what

1
2 is wrong my client has not been sitting
3 on his hands for ten or thirteen years
4 since he owns it. He's been trying to
5 develop it. He's trying to develop it
6 in an environmentally sensitive way.
7 First, he had approval to build a golf
8 course, still encumbering many
9 environmental impediments. Ultimately
10 giving up. Where he could have built a
11 hundred homes, he kept scaling it back,
12 scaling it back due to environmental
13 concerns. Still scaling it back to six
14 homes and ultimately come to the point
15 where this road is necessary to salvage
16 something on the value of the property.
17 To sit here and say my client has done
18 nothing about this road, yes, he tried
19 to develop this property in an
20 environmentally sensitive way for many
21 years.
22 THE COURT: What I have to do now
23 is calculate, before getting a
24 preliminary injunction plaintiff will
25 have to submit an undertaking. This is

2 mandatory in an amount to be fixed by
3 the Court, that it is finally determined
4 that he was not entitled to an
5 injunction. The plaintiff will pay the
6 defendant all damages in cost which may
7 be sustained by reason of the
8 injunction. There is a difference in
9 calculating the inherent value with an
10 interference one's inherent property
11 rights would be impossible to calculate
12 a monetary price on an interference with
13 a property right but in this case it
14 seems the law requires the bond to
15 consider the amount of damages incurred
16 by reason of the injunction actual
17 damages. In most cases, this is
18 somewhat a different type of proceeding,
19 one's action may halt work by a
20 contractor, there may have been
21 committments with respect to underlying
22 mortgages, there may be loans taken,
23 payrolls that have to be met, if all the
24 work is ceased and ultimately the party
25 against whom the injunction was granted

2 prevails then that individual would be
3 entitled to those actual damages. Any
4 amount of attorneys fees, Siegal
5 references attorneys fees.
6 MR. BENOWICH: Under Marabolis (ph.)
7 Case I don't believe attorneys fees are
8 included with the bond. This is actual
9 damages not legal attorneys fees.
10 THE COURT: If it shows the trial
11 would have gone forward by implication
12 same should be true of pre-trial in
13 general. Attorneys fees should be
14 recoverable only if incurred as a result
15 of the injunction. I'll direct that a
16 bond be posted in the amount of a
17 hundred thousand dollars.
18 Is there anything else at this time?
19 MR. BENOWICH: No, Your honor.
20 THE COURT: You will ultimately
21 here from Judge Nicolai with respect to
22 the underlying action. The letters
23 should be sent to Judge Nicolai, I have
24 no say in the assignment. As far as the
25 environmental part, don't assume because

2 you sent those letters to me that Judge
3 Nicolai will see them or know the
4 content. I will be out next week. I
5 will fax them to him and/or contact Lisa
6 Florio with respect to that issue and
7 they will ultimately resolve that issue.
8 Is there anything else?
9 MR. BENOWICH: If Your Honor is away,
10 it's probably better for both of us if
11 we have a formal-- you haven't
12 indicated -- you've granted the motion,
13 that the extent is the same in the TRO,
14 I'm happy to prepare a form of order for
15 Your Honor when you come back.
16 THE COURT: I don't see why it
17 shouldn't be the same in the TRO.
18 MR. BENOWICH: I think it's
19 appropriate the injunction speak clearly
20 as to what may or may not be. It's easy
21 enough to prepare an order which will be
22 here when Your Honor gets back.
23 THE COURT: I assume it would be
24 the same.
25 MR. DONNELLAN: I think we had talked

2 about that today and you've indicated
3 something in your decision that it would
4 not be objectionable for surveyors to go
5 with their tripods, for instance, I'm
6 not sure if that was permitted under the
7 original TRO, it may have been limited
8 to hiking. As long as we have engineers
9 that need to view or take photographs or
10 need to make surveys of the property,
11 studies, without disturbing the property
12 and roadway.
13 THE COURT: I don't see how I could
14 prevent that. If the Conservancy is
15 opened until dawn to dusk, as long as
16 they are not there at midnight and not
17 cutting down trees in the way to conduct
18 the survey, I don't think I could
19 prevent them from going on the property.
20 I say settle it instead of submit it.
21 Work that language out. There are means
22 to get these things to me even though I
23 am on vacation. I have relatives in the
24 courthouse who could bring stuff home
25 for me and I can come in and sign it.

1
2 work out that issue. I can't prevent
3 anybody, agent of Seven Springs, to
4 exercise their right to be there. A
5 hiker can be there and take movies and
6 pictures and spend an entire day there.
7 Certainly they shouldn't go on the
8 property with trucks, four wheel drive
9 vehicles, unless they are used now on
10 the Nature Conservancy.
11 MR. BENOWICH: They are not.
12 THE COURT: I don't want anyone
13 clear cutting to take pictures. Settle
14 that on the language. Thank you very
15 much.
16 oOo
17
18 I, Susan M. Lanzetta, Senior Court
Reporter for the Supreme Court of the
19 State of New York, do hereby certify
that the within transcript is a true and
20 correct record.
21

22 Susan M. Lanzetta
Senior Court Reporter
23
24
25

C

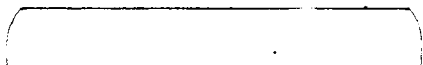


Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY

---x

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

---x

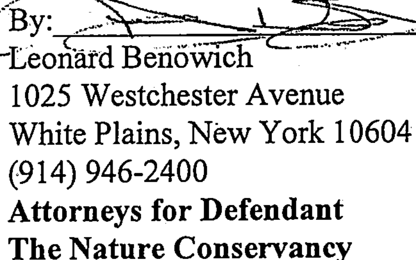
Index No. 9130/06

NOTICE OF FILING UNDERTAKING - CPLR 6312

Defendant The Nature Conservancy hereby files the within undertaking pursuant to the Order of this Court dated April 14, 2008.

Dated: April 15, 2008

BENOWICH LAW, LLP



By: ______________
Leonard Benowich
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400
Attorneys for Defendant The Nature Conservancy

To:
DELBELLO DONNELLAN WEINGARTEN WISE & WIERDEKEHR, LLP
One North Lexington Avenue
White Plains, New York 10601
Attorneys for Plaintiff

STEPHENS BARONI REILLY & LEWIS, LLP
75 Main Street
White Plains, NY 10601
Attorneys for Defendant Town of North Castle

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER, LLP
120 Bloomingdale Road
White Plains, NY 10605
Attorneys for Defendants Robert and Teri Burke and Noel B. and Joann Donohoe

INJUNCTION BOND

Bond No. HOIFSU0420232

Seven Springs, LLC,
Plaintiff(s)

vs.

The Nature Conservancy,
Defendant(s)

State of New York
County of Westchester

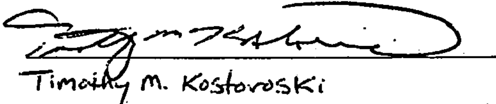
KNOW ALL MEN BY THESE PRESENTS, that we, The Nature Conservancy, defendant(s) as Principal, and International Fidelity Insurance Company, a corporation organized under the laws of the State of New Jersey , and duly authorized to transact business in the State of New York , as Surety, are held and firmly bound unto Supreme Court - State of New York, IAS Part Westchester County, in the penal sum of ONE HUNDRED THOUSAND and 00/100 DOLLARS ($100,000.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the above named defendant(s) have duly applied to this court for a writ of injunction against the plaintiff(s) in this action, according to the statute in such cases provided.

NOW, THEREFORE, the condition of this obligation is such that, if the said defendant(s) shall pay the said plaintiff(s) such damages as he sustains by reason of said temporary injunction, if the Court finally decided that the said defendant(s) is not entitled thereto (or to either or any of them, if more than one plaintiff), then this obligation shall be void, otherwise to remain in full force and effect.

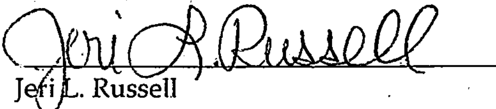
Signed, sealed and dated this 11th day of April, 2008.

ATTEST



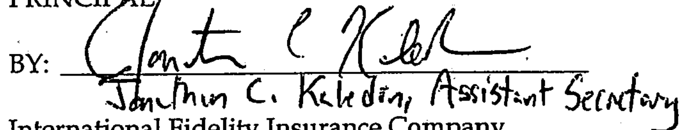
Timothy M. Kostorosski

ATTEST



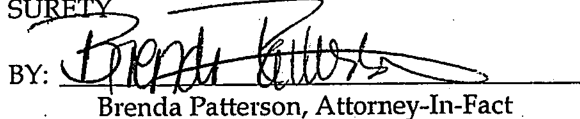
Jeri L. Russell

The Nature Conservancy
PRINCIPAL

BY: 

Jonathan C. Keledin, Assistant Secretary

International Fidelity Insurance Company
SURETY

BY: 

Brenda Patterson, Attorney-In-Fact

Tel (973) 624-7200

POWER OF ATTORNEY
INTERNATIONAL FIDELITY INSURANCE COMPANY

HOME OFFICE: ONE NEWARK CENTER, 20TH FLOOR
NEWARK, NEW JERSEY 07102-5207

KNOW ALL MEN BY THESE PRESENTS: That INTERNATIONAL FIDELITY INSURANCE COMPANY, a corporation organized and existing laws of the State of New Jersey, and having its principal office in the City of Newark, New Jersey, does hereby constitute and appoint

WILLIAM G. FRANEY, EAMONN T. LONG, JOHN MUHA, BRENDA PATTERSON

Lanham, MD.

its true and lawful attorney(s)-in-fact to execute, seal and deliver for and on its behalf as surety, any and all bonds and undertakings, contracts of indemnity and other writings obligatory in the nature thereof, which are or may be allowed, required or permitted by law, stature, rule, regulation, contract or otherwise, and the execution of such instrument(s) in pursuance of these presents, shall be as binding upon the said INTERNATIONAL FIDELITY INSURANCE COMPANY, as fully and amply, to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal office.

This Power of Attorney is executed, and may be revoked, pursuant to and by authority of Article 3-Section 3, of the By-Laws adopted by the Board of Directors of INTERNATIONAL FIDELITY INSURANCE COMPANY at a meeting called and held on the 7th day of February, 1974.

The President or any Vice President, Executive Vice President, Secretary or Assistant Secretary, shall have power and authority

(1) To appoint Attorneys-in-fact, and to authorize them to execute on behalf of the Company, and attach the Seal of the Company thereto, bonds and undertakings, contracts of indemnity and other writings obligatory in the nature thereof and,

(2) To remove, at any time, any such attorney-in-fact and revoke the authority given.

Further, this Power of Attorney is signed and sealed by facsimile pursuant to resolution of the Board of Directors of said Company adopted at a meeting duly called and held on the 29th day of April, 1982 of which the following is a true excerpt:

Now therefore the signatures of such officers and the seal of the Company may be affixed to any such power of attorney or any certificate relating thereto by facsimile, and any such power of attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by facsimile signatures and facsimile seal shall be valid and binding upon the Company in the future with respect to any bond or undertaking to which it is attached.

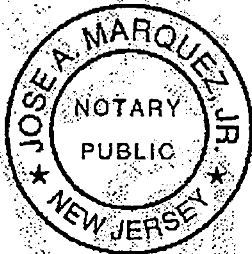
IN TESTIMONY WHEREOF, INTERNATIONAL FIDELITY INSURANCE COMPANY has caused this instrument to be signed and its corporate seal to be affixed by its authorized officer, this 29th day of August, A.D. 2003.

INTERNATIONAL FIDELITY INSURANCE COMPANY

STATE OF NEW JERSEY
County of Essex

Secretary

On this 29th day of August 2003, before me came the individual who executed the preceding instrument, to me personally known, and, being by me duly sworn, said the he is the therein described and authorized officer of the INTERNATIONAL FIDELITY INSURANCE COMPANY; that the seal affixed to said instrument is the Corporate Seal of said Company; that the said Corporate Seal and his signature were duly affixed by order of the Board of Directors of said Company.



IN TESTIMONY WHEREOF, I have hereunto set my hand affixed my Official Seal, at the City of Newark, New Jersey the day and year first above written.

A NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Nov. 21, 2010

CERTIFICATION

I, the undersigned officer of INTERNATIONAL FIDELITY INSURANCE COMPANY do hereby certify that I have compared the foregoing copy of the Power of Attorney and affidavit, and the copy of the Section of the By-Laws of said Company as set forth in said Power of Attorney, with the ORIGINALS ON IN THE HOME OFFICE OF SAID COMPANY, and that the same are correct transcripts thereof, and of the whole of the said originals, and that the said Power of Attorney has not been revoked and is now in full force and effect.

IN TESTIMONY WHEREOF, I have hereunto set my hand this 11th day of April, 2008

Assistant Secretary

Poor Quality

D

Exhibit D

Supreme Court of the State of New York
Appellate Division : Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.8).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

X

SEVEN SPRINGS, LLC,
Plaintiff,
Index No.: 9130/06

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,
Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type
- [x] Civil Action
- [ ] CPLR article 75 Arbitration
- [ ] CPLR article 78 Proceeding
- [ ] Special Proceeding Other
- [ ] Habeas Corpus Proceeding

Filing Type
- [x] Appeal
- [ ] Original Proceeding
- [ ] Transferred Proceeding
- [ ] CPLR 5704 Review

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review
- [ ] 1 Freedom of Information Law
- [ ] 2 Human Rights
- [ ] 3 Licenses
- [ ] 4 Public Employment
- [ ] 5 Social Services
- [ ] 6 Other

B. Business & Other Relationships
- [ ] 1 Partnership/Joint Venture
- [ ] 2 Business
- [ ] 3 Religious
- [ ] 4 Not-for-Profit
- [ ] 5 Other

C. Contracts
- [ ] 1 Brokerage
- [ ] 2 Commercial Paper
- [ ] 3 Construction
- [ ] 4 Employment
- [ ] 5 Insurance
- [ ] 6 Real Property
- [ ] 7 Sales
- [ ] 8 Secured
- [ ] 9 Other

D. Domestic Relations
- [ ] 1 Adoption
- [ ] 2 Attorney's Fees
- [ ] 3 Children - Support
- [ ] 4 Children - Custody/Visitation
- [ ] 5 Children - Terminate Parental Rights
- [ ] 6 Children - Abuse/Neglect
- [ ] 7 Children - JD/PINS
- [ ] 8 Equitable Distribution
- [ ] 9 Exclusive Occupancy of Residence
- [ ] 10 Expert's Fees
- [ ] 11 Maintenance/Alimony
- [ ] 12 Marital Status
- [ ] 13 Paternity
- [ ] 14 Spousal Support
- [ ] 15 Other

E. Miscellaneous
- [ ] 1 Constructive Trust
- [ ] 2 Debtor & Creditor
- [ ] 3 Declaratory Judgment
- [ ] 4 Election Law
- [ ] 5 Notice of Claim
- [ ] 6 Other

F. Prisoners
- [ ] 1 Discipline
- [ ] 2 Jail Time Calculation
- [ ] 3 Parole
- [ ] 4 Other

G. Real Property
- [ ] 1 Condemnation
- [x] 2 Determine Title
- [x] 3 Easements
- [ ] 4 Environmental
- [ ] 5 Liens
- [ ] 6 Mortgages
- [ ] 7 Partition
- [ ] 8 Rent
- [ ] 9 Taxation
- [ ] 10 Zoning
- [ ] 11 Other

H. Statutory
- [ ] 1 City of Mount Vernon Charter §§ 120, 127-f, or 129
- [ ] 2 Eminent Domain Procedure Law § 207
- [ ] 3 General Municipal Law § 712
- [ ] 4 Labor Law § 220
- [ ] 5 Public Service Law §§ 128 or 170
- [ ] 6 Other

I. Torts
- [ ] 1 Assault, Battery, False Imprisonment
- [ ] 2 Conversion
- [ ] 3 Defamation
- [ ] 4 Fraud
- [ ] 5 Intentional Infliction of Emotional Distress
- [ ] 6 Interference with Contract
- [ ] 7 Malicious Prosecution/Abuse of Process
- [ ] 8 Malpractice
- [ ] 9 Negligence
- [ ] 10 Nuisance
- [ ] 11 Products Liability
- [ ] 12 Strict Liability
- [ ] 13 Trespass and/or Waste
- [ ] 14 Other

J. Wills & Estates
- [ ] 1 Accounting
- [ ] 2 Discovery
- [ ] 3 Probate/Administration
- [ ] 4 Trusts
- [ ] 5 Other

V2.0.060293

Poor Quality

Appeal

Paper Appealed From (check one only):

☐ Amended Decree	☐ Determination	☑ Order	☐ Resettled Order
☐ Amended Judgment	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: **Supreme**	County: **Westchester**
Dated: **April 14, 2008**	Entered: **April 14, 2008**
Judge (name in full): **Rory J. Bellantoni**	Index No.: **9130/06**
Stage: ☒ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☒ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Defendant The Nature Conservancy ("TNC") moved for a temporary restraining order and preliminary injunction pursuant to CPLR §6301 restraining and enjoining Plaintiff, its agents, employees, and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing from:(a) entering upon the lands owned by [TNC] and maintained by [TNC] as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon the same, and (b) performing any work upon any land owned by [TNC] including that portion of Oregon Road which lies or is contained within the Nature Preserve and which is the subject matter of this action. The Order of the lower Court granted TNC's motion, and directed TNC to file an undertaking in the amount of $100,000.00.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

Whether the Court below erred in granting TNC's motion?

Whether TNC demonstrated its right to injunctive relief by establishing a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor?

Whether the lower court erred in limiting the amount of the undertaking required to be filed by TNC to $100,000.00.

Poor Quality

Issues Continued:

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	Seven Springs, LLC	Plaintiff	Appellant
2	The Nature Conservancy	Defendant	Respondent
3	Realis Associates	Defendant	Non-Party
4	The Town of North Castle	Defendant	Respondent
5	Robert Burke and Teri Burke	Defendant	Respondent
6	Noel B. Donohoe and Joann Donohoe	Defendant	Respondent
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Poor Quality

Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
Address: One North Lexington Avenue
City: White Plains State: NY Zip: 10601 Telephone No.: 914-681-0200
Attorney Type: [x] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 1

Attorney/Firm Name: Benowich Law, LLP
Address: 1025 Westchester Avenue
City: White Plains State: NY Zip: 10604 Telephone No.: 914-946-2400
Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 2

Attorney/Firm Name: Stephens Baroni Reilly & Lewis, LLP
Address: 75 Main Street
City: White Plains State: NY Zip: 10601 Telephone No.: (914) 761-0300
Attorney Type: [x] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 4

Attorney/Firm Name: Oxman Tulis KirkPatrick Whyatt & Geiger, LLP
Address: 120 Bloomingdale Road
City: White Plains State: NY Zip: 10605 Telephone No.: (914) 422-3900
Attorney Type: [x] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C): 5 6

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above or from Form C):

Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention (Form A, this document); (2) any required Additional Appeal Information Forms (Form B); (3) any required Additional Party and Attorney Information Forms (Form C); (4) the notice of appeal or order granting leave to appeal; (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken; and (6) a copy of the decision or decisions of the court of original instance, if any.

Poor Quality

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

______________________________________X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, REALIS ASSOCIATES, THE TOWN OF NORTH CASTLE, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

______________________________________X

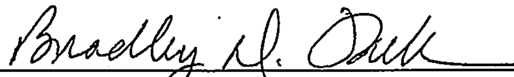
Index No. 9130/06

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiff, SEVEN SPRINGS, LLC, by its attorneys DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, hereby appeals to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, from each and every part of the Order of the Honorable Rory J. Bellantoni dated April 14, 2008 and entered in the office of the County Clerk of Westchester County on April 14, 2008.

Dated: White Plains, New York
May 9, 2008

DELBELLO DONNELLAN WEINGARTEN
WISE & WIEDERKEHR, LLP
Attorneys for Plaintiff



By: BRADLEY D. WANK, ESQ.
One North Lexington Avenue
White Plains, New York 10601
(914) 681-0200

TO: Roosevelt & Benowich, LLP
Attorneys for Defendant
The Nature Conservancy
1025 Westchester Avenue
White Plains, New York 10604
(914) 946-2400

1244370
0143500-001

Stephens Baroni Reilly & Lewis, LLP
Attorneys for Defendant
Town of North Castle
175 Main Street
White Plains, New York 10601
(914) 761-0300

Oxman Tulis Kirkpatrick Whyatt & Geiger, LLP
Attorneys for Defendants Burke and Donohoe
120 Bloomingdale Road
White Plains, New York 10605
(914) 422-3900

RECEIVED

APR 14 2008

RORY J. BELLANTONI
COUNTY COURT CHAMBERS

AT the Supreme Court, Westchester County, at the County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains, New York, on April 14, 2008

PRESENT:

HON:

RORY J. BELLANTONI,

Acting Justice.

---x

FILED
AND
ENTERED
ON 4-14 20 08

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY,
REALIS ASSOCIATES,
THE TOWN OF NORTH CASTLE,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

---x

Index No. 9130/06

ORDER GRANTING
PRELIMINARY INJUNCTION

Defendant The Nature Conservancy ("TNC") having moved this Court, by order to show cause dated March 18, 2008, for a temporary restraining order and preliminary injunction ("Motion"), and this matter having come on to be heard before the Court on March 18, 2008 and on April 4, 2008, and the Court having considered the following papers in support of and in opposition to the Motion, all with due proof of service thereof: (1) the Order to Show Cause dated March 18, 2008, supported by the Affirmation of Leonard Benowich, Esq., dated March 13, 2008, the Affidavit of Amy Fenno, sworn to March 11, 2008, and the Affidavit of Jamie Norris, sworn to March 13, 2008, together with Exhibits 1-18 annexed thereto, and a

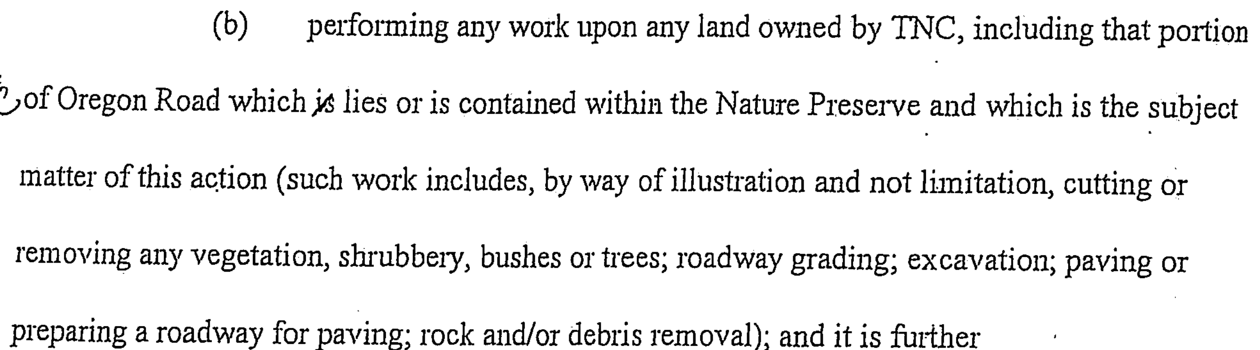
memorandum of law dated March 13, 2008, in support of the Motion; (2) the affidavit of Alfred Donnellan, Esq., sworn to March 17, 2008, and Exhibits A-E annexed thereto (on behalf of Plaintiff Seven Springs, LLC), and a memorandum of law dated March 17, 2008, in opposition to the Motion; (3) the Affidavit of Alfred Donnellan, Esq., sworn to March 26, 2008, and Exhibits A-G thereto (on behalf of Plaintiff Seven Springs, LLC) and a memorandum of law dated March 26, 2008, in opposition to the Motion; (4) the Reply Affirmation of Leonard Benowich, dated April 2, 2008, and Exhibits 19-22 annexed thereto, and a reply memorandum of law dated April 2, 2008, in support of the Motion; (5) the affirmation of John B. Kirkpatrick, Esq., sworn to April 2, 2008 (on behalf of defendants Robert Burke, Teri Burke, Noel B. Donohoe and Joann Donohoe), in support of the Motion; and (6) the affirmation of Gerald D. Reilly, Esq., dated April 2, 2008 (on behalf of defendant The Town of North Castle), in support of the Motion; and the parties, by their respective counsel, having been heard on March 18, 2008 in support of and in opposition to TNC's application for a temporary restraining order; and the Court having issued a temporary restraining order on March 18, 2008, and having directed that the parties appear on April 4, 2008 for oral argument of that portion of the Motion which sought a preliminary injunction; and the parties, by their respective counsel, having appeared before this Court for oral argument with respect thereto; and the Court, after hearing the arguments of counsel and upon due deliberation and consideration of the foregoing, having rendered its decision on the record of the proceedings held on April 4, 2008;

NOW, on Motion of BENOWICH LAW, LLP, counsel of record for defendant TNC, it is hereby

ORDERED, that TNC's Motion for a preliminary injunction is granted; and it is further

ORDERED, that during the pendency of this action, Plaintiff, its agents, employees and contractors, and all persons having knowledge of this Order or acting in concert with any of the foregoing, be and they hereby are preliminarily enjoined from:

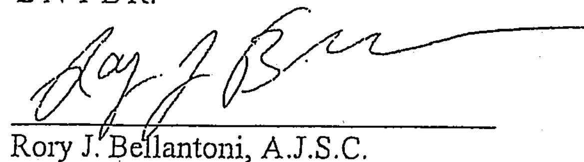
(a) entering upon the lands owned and/or maintained by TNC as the Eugene and Agnes B. Nature Preserve ("Nature Preserve") (i) with any vehicle, equipment or machinery; and (ii) for any purpose other than to walk or hike upon same (*provided, however*, that surveyors employed or retained by Plaintiff may walk upon and conduct land surveys from and of the aforementioned premises, provided that any equipment they bring with them must be carried by-hand by one person); and



(b) performing any work upon any land owned by TNC, including that portion of Oregon Road which ~~is~~ lies or is contained within the Nature Preserve and which is the subject matter of this action (such work includes, by way of illustration and not limitation, cutting or removing any vegetation, shrubbery, bushes or trees; roadway grading; excavation; paving or preparing a roadway for paving; rock and/or debris removal); and it is further

ORDERED, that within ten (10) days of service of a copy of this order with notice of entry, TNC shall give and file an undertaking in the amount of One Hundred Thousand Dollars ($100,000).

ENTER:



Rory J. Bellantoni, A.J.S.C.

C:\Main Files\TNC\SEVEN SPRINGS\Litigation\TRO\PJ ORDER.wpd

E

Exhibit E

Seven Springs, LLC v Nature Conservancy
Motion No: 2008-04417
Slip Opinion No: 2008 NYSlipOp 93073(U)
Decided on December 26, 2008
Appellate Division, Second Department, Motion Decision
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This motion is uncorrected and is not subject to publication in the Official Reports.

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M80372

S/sl

2008-04417

Seven Springs, LLC,
appellant,

v Nature Conservancy, et al., ORDER ON APPLICATION
respondents,

et al., defendant.

(Index No. 06-9130)

Application by the appellant pursuant to 22 NYCRR 670.8(d)(2) to enlarge the time to perfect an appeal from an order of the Supreme Court, Westchester

County, dated April 14, 2008.

ORDERED that the application is granted and the appellant's time to perfect the appeal is enlarged until February 6, 2009, and the record or appendix on the appeal and the appellant's brief must be served and filed on or before that date.

ENTER:

James Edward Pelzer

Clerk of the Court

F

Exhibit F

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP

COUNSELLORS AT LAW

THE GATEWAY BUILDING
ONE NORTH LEXINGTON AVENUE
WHITE PLAINS, NEW YORK 10601

(914) 681-0200
FACSIMILE (914) 684-0288

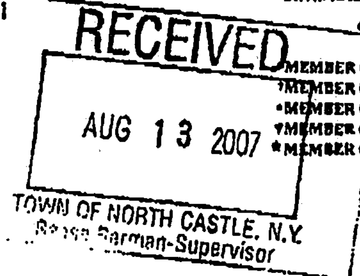
Thomas R. Beirne
Brian T. Belowich*
Ann Farrissey Carlson*
Alfred B. DelBello
Alfred E. Donnellan†
Janet J. Giris
Frank J. Haupel
Paul L. Marx+
Faith G. Miller
Patrick M. Reilly
James J. Sullivan
Bradley D. Wank*
Mark P. Weingarten*
Lee S. Wiederkehr
Peter J. Wise, AICP†

Jacob E. Amir
Matthew S. Clifford†
Jennifer M. Jackman*
Jennifer A. Lofaro*
Susan Currie Morehouse
Perry M. Ochacher
Stephan A. Kapaglia
Jessica H. Ressler
Michael J. Schwarz*
Daniel G. Walsh
Evan Wiederkehr
Heidi Winslow

Andrew J. Balint
Richard A. Katzive
Brandon R. Sall*
Eliot M. Schuman
David R. Selznick & Co., LLP

COUNSEL

*MEMBER OF NY & CT BARS
†MEMBER OF NY & NJ BARS
•MEMBER OF NY & DC BARS
†MEMBER OF NY, NJ & MA BARS
*MEMBER OF NY, NJ, CT & FL BARS



August 10, 2007

By Facsimile and Mail

Chairman Peg Michelman
Members of the Planning Board
Town of North Castle
15 Bedford Road
Armonk, New York 10504

Re: Seven Springs

Dear Chairman Michelman and Members of the Planning Board:

We represent Seven Springs, LLC, the applicant for approval of a subdivision of the property commonly known as Seven Springs. Our client has asked us to advise the Planning Board that it hereby withdraws the application made to the Planning Board for approval of a subdivision of the portion of the property that is within the Town of North Castle.

Thank you for your consideration.

Very truly yours,

MARK P. WEINGARTEN

cc: Supervisor Reese Berman
Roland A. Baroni, Jr., Esq., Town Attorney
Adam Kaufman, AICP, Planning Director
Chairman Donald J. Coe, Bedford Planning Board
Joel Sachs, Esq., Bedford Town Attorney
Jeffrey Osterman, AICP, Bedford Planning Director
Donald J. Trump
Hal Goldman
Peter J. Wise, Esq.

G

Exhibit G

Final 6/3/09

FINDINGS STATEMENT
SEVEN SPRINGS SUBDIVISION AND EQUESTRIAN FACILITY
TOWN OF BEDFORD, NEW YORK

I. INTRODUCTION

This document is a Findings Statement prepared pursuant to and as required by Part 617.11 of NYCRR Part 617, Title 6 (the Statewide regulations implementing the New York State Environmental Quality Review Act). This Findings Statement pertains to the environmental review of the proposed Seven Springs Subdivision. This Findings Statement draws upon the facts and conclusions in the Draft Environmental Impact Statement (DEIS) accepted by the Lead Agency on June 10, 2008 and the Final Environmental Impact Statement (FEIS) accepted by the Lead Agency on March 27, 2009.

This Findings Statement attests to the fact that the Town of Bedford Planning Board, acting as Lead Agency in the environmental review of this matter, has complied with all of the applicable procedural requirements of Part 617 in reviewing this matter, including but not limited to the following:

- Circulation of Notice of Intent to be Co-Lead Agency for the two-town subdivision plan by the Planning Boards of the Towns of Bedford and North Castle on May 14, 2004;
- Designation of the Town of Bedford Planning Board and the Town of North Castle Planning Board as the Co-Lead Agency on June 14, 2004;
- Issuance of a Positive Declaration on June 14, 2004 by the Co-Lead Agency and direction to prepare a Draft Environmental Impact Statement ("DEIS");
- Holding of a public Scoping Session for the DEIS by the Co-Lead Agency on June 29, 2004;
- Preparation of a DEIS by the Applicant;
- Review by the Co-Lead Agency of multiple drafts of the proposed DEIS with respect to completeness;

- Withdrawal by the applicant of all applications to the Town of North Castle on August 10, 2007;

- Circulation of Notice of Intent to be sole Lead Agency for the proposed Bedford only subdivision plan by the Town of Bedford Planning Board on October 30, 2007;

- Acceptance of the DEIS for the Bedford only plan by the Lead Agency and the filing of the DEIS and Notice of Completion on June 10, 2008;

- Holding of a Public Hearing on the DEIS by the Lead Agency on July 29, 2008;

- Closing of the Public Hearing on the DEIS on July 29, 2008 and the establishment of a public comment period on the DEIS for submission of additional written comments ending on August 29, 2008:

  Preparation of a FEIS by the applicant;

- Review by the Lead Agency of two drafts of the proposed FEIS with respect to completeness;

- Acceptance of the Final Environmental Impact Statement ("FEIS") by the Lead Agency and the filing of the FEIS and Notice of Completion on March 27, 2009 and the establishment of a public comment period on the FEIS for the submission written comments ending on April 30, 2009;

- Review and consideration of comments submitted by Involved Agencies, Interested Agencies and members of the public in writing and at public meetings throughout the course of the environmental review process; and

- Preparation and adoption of this Findings Statement by the Lead Agency.

This Findings Statement also attests to the fact that the Lead Agency has given due consideration to the Environmental Impact Statement (EIS) prepared in conjunction with this action and the public comments submitted on the same. Furthermore, this Findings Statement contains the facts and conclusions in the EIS that were relied upon by the Lead Agency to support its decisions and indicates the social, economic and other factors and standards that form the basis for its decisions.

A. Site Description

The site of the proposed Seven Springs Residential Subdivision and Equestrian Facility is the 80.5-acre Bedford portion of the 213-acre former Eugene and Agnes Meyer estate located in northern Westchester County at the intersection of the Towns of Bedford, North Castle and New Castle. This part of the estate is generally bordered on the north by approximately 920 feet of frontage on Oregon Road (in the Town of Bedford); on the east by approximately 1400 feet of Byram Lake watershed lands owned by the Village of Mount Kisco; on the south by the town boundary between the Towns of Bedford and North Castle; on the west by a single-family residence on a 10 acre parcel.

The area surrounding the site to the north, west and south is composed principally of nature preserves, parkland and low-density residential development. In addition to the 247-acre Eugene and Agnes Meyer Nature Preserve located to the south and southwest of the site, other major open space parcels in the vicinity include the 358-acre Arthur W. Butler Memorial Sanctuary, the 100-acre Marsh Sanctuary and the 100-acre Merestead estate that is now Westchester County parkland. The closest residential areas to the west include a 10-acre parcel that is surrounded by the site on three sides and is developed with a single-family residence and several accessory buildings as well as four other single-family residences located along or near Oregon Road in the Town of Bedford. To the west, existing single-family residential development exists along Sarles Street and Bretton Ridge Road in the Town of New Castle. Since the Eugene and Agnes Meyer Nature Preserve abuts the site to the south and southwest, the nearest residential development in the Town of North Castle is located further to the southwest along Sarles Street and approximately 800 feet to the south of the site on Oregon Hollow and Oregon Road.

The 80.5 acre Bedford portion of the site is located in the R-4A District, a zoning designation permitting single-family residential development on a minimum lot size of four acres. The 97.8-acre North Castle portion of the site is located within an R-4A District. The 31.5 acre New Castle portion of the site are located within an R-2A District, permitting single-family residential development on a minimum lot size of two acres.

The Bedford portion of the site is predominantly open fields and moderate terrain. The site contains areas of landscaped estate grounds, open meadows, an open wetland, an old orchard and many stonewalls. The high point of the site is at elevation 758 (feet above sea level) and is located on a knoll near the North Castle border at an existing stone water tower. The low point of the site is at approximately elevation 525 and is located at the southeasterly corner of the property adjacent to Byram Lake. Approximately 82 percent of the site contains slopes of 0-15 percent; another 10 percent of the site contains slopes of 15-25 percent; and the remaining 8 percent of the site contains slopes of 25 percent or steeper.

Two separate Town-regulated wetland areas on the site total approximately 0.43 acres. Approximately 37 percent of the greater, three-town site drains to the Kisco River and is therefore within the New York City Croton Watershed. Another 56 percent of the site drains to Byram Lake and is therefore within the watershed of the Village of Mount Kisco's water supply reservoir (which has been designated as a Critical Environmental Area (CEA) by the Town of Bedford and Westchester County). The remaining 7 percent of the site drains to the Wampus River and eventually to Long Island Sound.

The existing structures on the Bedford portion of the site include a farmhouse constructed prior to 1851, a caretaker's house, a large barn complex, carriage barn, greenhouse and garden buildings, a stone water tower, root cellar, and Nonesuch, a Tudor style stone residence with a courtyard and a tennis court.

B. Project History

The Applicant first submitted applications for approval to the Towns of Bedford, North Castle and New Castle in June 1996 for the development of the site as a private membership club which was to include an 18-hole golf course with pro shop, putting green, practice range, short game practice area and maintenance building; a clubhouse in the former Seven Springs estate house with dining facilities, lounge areas, locker rooms and overnight suites accommodating up to 12 club members; a separate guest house in the existing Nonesuch estate house with overnight suites accommodating up to 12 club members, a swimming pool and a tennis court; parking areas and appurtenant facilities; and the construction of nine single-family residences.

The Applicant proposed to sponsor professional golf tournaments at the site, which would have been open to the public. Part of the golf club, including the clubhouse and the maintenance area, and two single-family residences were to be located in the Town of North Castle. Part of the golf club, all of the Nonesuch facilities and one single-family residence were to be located in the Town of Bedford. Six single-family residences were to be located in the Town of New Castle. Primary access to the golf club was to be provided from the existing site driveway on Oregon Road. Access to the residential development in New Castle and North Castle was to be provided from a new subdivision road intersecting with Sarles Street in the Town of New Castle. Although that proposal also involved a connection of the proposed subdivision road to Oregon Road in the Town of Bedford, through traffic between Sarles Street in New Castle and Oregon Road in Bedford would not have been possible since the installation of gates and gatehouses at either end of the new subdivision road was proposed. The Draft Environmental Impact Statement prepared for this golf course project and accepted by the then Co-Lead Agency, consisting of the Bedford Zoning Board of Appeals, New Castle Planning Board and North Castle Town Board, in August 1998 was based upon the original development concept proposed by the Applicant ("the DEIS Site Plan").

Following the close of the public hearing on the DEIS and the expiration of the public comment period in November 1998, the Applicant was directed to prepare a Final Environmental Impact Statement (FEIS) for consideration by the Co-Lead Agency. Prior to submission of the first draft of the FEIS, the Applicant notified the Co-Lead Agency that it had modified the proposed development concept for the project in response to comments by the reviewing agencies and the public, and in order to avoid or further mitigate potential impacts of the proposal on the site and the community. The Applicant further advised the Co-Lead Agency that it would describe those project modifications in the FEIS.

The principal modification to the original golf course plan proposed by the Applicant was the elimination of the eight single-family residences in the Towns of New Castle and North Castle and the elimination of the new subdivision road intersecting with Sarles Street. The Applicant also stated that it planned to convey all of the New Castle land to The Nature Conservancy or another similar conservation organization, subject to a restrictive declaration intended to protect that land in its natural state in perpetuity. Other significant modifications proposed by the Applicant included elimination of all professional tournaments and events involving paid admission, spectator gallery; separate short game area; revision of Golf Holes #10, #11, #12 and #15, redesign of the Nonesuch area in the Town of Bedford, including provision of a separate driveway access to Oregon Road in the Town of Bedford; addition of restrictions on the use of the driveway from Oregon Road in the Town of Bedford to the maintenance area; and the provision of an additional emergency access connection to the site from the existing driveway behind Nonesuch. The Final Environmental Impact Statement prepared for this project and accepted by the Co-Lead Agency in November 2000 was based upon the modified plan proposed by the Applicant ("the FEIS Site Plan").

Based upon the modified golf course plan, the Applicant formally withdrew its applications for a subdivision plat, wetlands permit, steep slope permit and tree removal permit in the Town of New Castle. Subsequently, the Town of New Castle also withdrew as a member of the Co-Lead Agency subject to the stipulation, among other conditions, that gave the Town of New Castle the right to rejoin the Co-Lead Agency as a fully participating member in the event that the Applicant further modified the proposed development concept during the course of the SEQRA review by the Co-Lead Agency so as to require a regulatory permit or approval from the Town of New Castle.

A Findings Statement prepared in accordance with SEQR regulations was adopted by the Co-Lead Agency for the modified plan on April 25, 2002. The Bedford Planning Board was not part of the Co-Lead Agency and did not approve a Findings Statement for the golf course.

In March 2004 a different development plan for the property was submitted to the Towns

of Bedford and North Castle. This plan consisted of a single-family residential subdivision containing 8 single-family lots in Bedford and 9 single-family lots in North Castle. The North Castle portion of this plan was withdrawn in August 2007.

II. PROPOSED ACTION

A. Project Description

The Proposed Action is a residential subdivision of the Bedford portion of the Seven Springs site into nine lots: seven lots for new single-family residences ranging in size from 6.65 to 11.26 acres, one lot for the existing "Nonesuch" home (8.31 acres) and one lot for a private equestrian facility with staff housing (9.03 acres). The existing large barn complex will be renovated and re-used as the equestrian facility. The white farmhouse will also be preserved and renovated for use as a homeowner's association common facility. The carriage barn will be replaced with a staff housing facility incorporating four studio apartments with a central kitchen designed to occupy the same general footprint as the existing building and to be in character with the existing farm structures.

Access to Lots B1 and B2, the existing Nonesuch lot, will be over Oregon Road, an existing public road. Access to all other lots is proposed over a new private road intersecting Oregon Road (north), an existing public road in the Town of Bedford. The Meyer estate house will remain on the existing 103.8-acre lot in the Town of North Castle with access over its existing driveway from the proposed new private road in Bedford.

The proposed new private road is designed to conform to all Bedford town road standards except pavement width and length. Waivers for both pavement width and road length will be requested from the Planning Board. Under the Town of Bedford Subdivision Regulations, a dead-end road cannot serve more than fifteen homes, however the Planning Board may waive this requirement. Nine existing homes on Oregon Road, two existing homes on the property (Nonesuch and the Meyer estate) and seven new homes would be served by the new private road. No access to the North Castle portion of the site is proposed.

The 28.7-acre portion of the site in the Town of New Castle is not currently proposed to be developed. However, to ensure that potential future cumulative impacts are addressed, a hypothetical 5-lot subdivision of that portion was analyzed in the DEIS. Similarly, although no new development is currently proposed in North Castle, potential future cumulative impacts of a hypothetical subdivision are analyzed in the DEIS.

A homeowner's association (HOA) will be formed, subject to the approval of the New York Attorney General's office. All lots including the Meyer estate lot will be members

of the HOA, be subject to its rules and regulations and will own fee title to their individual lot plus an interest in common with all other lot owners in all HOA property. The private road will be maintained by a company owned by Donald Trump or its assignees. This company will have the obligation to maintain the on-site detention basin located on lot #B4 and will also be responsible to implement and enforce the Residential Lawn Management Plan (RLMP).

The equestrian facility will be owned and operated by a company owned by Donald Trump. The company will enter into a continuing contract with the homeowners, through the homeowner's association, which will set forth the obligations and benefits of all parties. The company will perform all functions necessary to board the horses and to maintain the facility.

The applicant has agreed that there will be no further subdivision of the Bedford portion of the site into additional building lots. This restriction will be indicated on the subdivision plat and by separate recorded agreement.

Water supply to the proposed lots will be provided by private, individual wells. Sewage from all lots will be treated in conventional subsurface sewage disposal systems. Both water supply and sewage disposal systems will be approved by the Westchester County Department of Health.

B. Required Approvals

The Proposed Action requires the following approvals:

1. **Town of Bedford Zoning Board of Appeals**
   Variance approvals for lot coverage for Lot B2 and for equestrian facility and staff housing on Lot B4 pursuant to Chapter 125 (Zoning).

2. **Town of Bedford Planning Board**
   Special Permit approval for equestrian facility and staff housing pursuant to Chapter 125 (Zoning) of the Bedford Town Code.
   Subdivision approval pursuant to Chapter 107 (Subdivision of Land) of the Bedford Town Code, including waiver for road pavement width and road length.
   Steep Slope Permit approval pursuant to Chapter 102 (Steep Slopes) of the Bedford Town Code.
   Tree Removal Permit approval pursuant to Chapter 112 (Tree Preservation) of the Bedford Town Code.
   Review and approval of Stormwater Pollution Prevention Plan pursuant to Chapter 103 (Stormwater Management) of the Bedford Town Code.

3. **Town of Bedford Historic Building Preservation Commission**
   Demolition permit for carriage barn.

4. **Town of Bedford Wetlands Control Commission**
Wetlands Permit approval pursuant to Chapter 122 (Wetlands) of the Bedford Town Code if a regulated act is proposed.

5. **New York City Department of Environmental Protection (NYCDEP)**
Approval of Stormwater Pollution Prevention Plan (SWPPP) for stormwater discharges within New York City Croton Watershed areas of the site.

6. **Westchester County Department of Health (WCDOH)**
Subsurface sewage treatment system (SSTS) approvals for maintenance area and the one single-family residence.
Water supply (well) approvals.
Approval of Realty Subdivision.

7. **Westchester County Planning Department**
Advisory review.

8. **Westchester County Soil/Water Conservation District**
Advisory review.

9. **New York State Department of Environmental Conservation (NYSDEC)**
Approval of General State Pollution Discharge Elimination System (SPDES) Permit and Stormwater Pollution Prevention Plan (SWPPP) for stormwater discharges.

10. **NYS Office of Parks, Recreation and Historic Preservation (NYSSOPRHP)**
Cultural resources review.

III. ENVIRONMENTAL IMPACTS OF PROPOSED ACTION

A. Geology and Soils

1. Impacts and Proposed Mitigation

The 80.5-acre Bedford portion of the site contains nine different soils types, including Charlton-Chatfield, Chatfield-Hollis Paxton and Woodbridge soils. The site's surface features are predominantly flatter terrain previously used for farming or residential lawn. Soil limitations on the development of this property pertain mostly to slopes and a few areas of shallow depth to bedrock.

According to the test boring reports, the subsurface soils encountered on the site are suitable for the proposed development. Rock may be encountered at some of the cut locations may need to be removed. In areas where fill is required, it can be placed after stripping the topsoil and rolling the subgrade. The silty sand, gravelly

silty sand, decomposed rock and the excavated rock can be used as new fill for both building areas and the general site work.

With excavation for ponds and utility lines and the construction of access drives and foundations, some blasting was originally anticipated to occur on the site. Based on comments received from the public on the DEIS, the Planning Board discussed this topic at several public Planning Board meetings. As a result of this discussion, the applicant has engaged the services of an additional civil engineer to evaluate this subject. Based on this review, the applicant has stated that no blasting is anticipated to construct the proposed project (FEIS, p. 43). With respect to blasting near the easterly side of the property near Byram Lake, the applicant has stated conclusively that no blasting will occur "at the crest of the slope overlooking Byram Lake" (FEIS, p. 34). The Planning Board has determined that no blasting will be permitted on this property under this approval process. Any blasting proposed by the applicant at a later time will require a new application to the Planning Board with required review under the Town of Bedford Blasting Law, the New York State Environmental Quality Review Act and all other applicable regulations.

Portions of virtually all of the identified soil types on the site, with the exception of Sun Loam (Sm), Hollis Rock outcrop complex (Hrf) and Chatfield-Hollis rock out outcrop complex (Ctc), will be affected to some degree by the construction of the proposed residential subdivision. Existing soils will be graded and shaped to achieve the proposed road, house sites, septic fields and stormwater detention areas.

Based upon the Subdivision Plan, it is estimated that approximately 33.6 acres of the 80.5-acre site would be temporarily disturbed, approximately 42 percent of the site. Of this area, the construction of the proposed infrastructure would impact 1.23 acres of slopes greater than 25%. The proposed home design plan would impact 2.03 acres of slopes 25% or greater. A Steep Slopes Permit from the Planning Board will be required for these areas. Based on the preliminary grading plan submitted by the applicant, the necessary earthwork will be balanced (FEIS, p. 8).

Where slopes are proposed to be disturbed, proactive stabilization methods, both temporary and permanent, will be used as a part of a comprehensive soil erosion and sedimentation control plan. Unless prior written approval is obtained from the Town, the amount of soil disturbance at any one time will be limited to no more than five acres in accordance with SPDES General Permit GP-0-08-001.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will not require blasting for its construction.

- Disturbance of existing soils will be required for construction of the subdivision road and buildings. The amount of disturbance proposed for the proposed subdivision is typical for this type of project.

- Prior to the signing of the Final Plat the applicant will be required to submit final plans for soil erosion and sediment control for review and approval.

- The Proposed Action will adequately avoid or mitigate potential impacts on geology and soils.

B. Topography and Slopes

1. Impacts and Proposed Mitigation

Potential impacts to slopes and topography, such as sedimentation and soil erosion, could occur during construction of the proposed development as soils are cut and filled to install the private road, drainage facilities and home sites.

Based upon the Subdivision Plan, it was estimated that approximately 33.6 acres of the 80.5-acre site would be temporarily disturbed, approximately 42 percent of the site. Of this area, the construction of the proposed infrastructure would impact 1.23 acres of slopes greater than 25%. The proposed home design plan would impact 2.03 acres of slopes 25% or greater. A Steep Slopes Permit from the Planning Board will be required for these areas. Based on the preliminary grading plan submitted by the applicant, the necessary earthwork will be balanced (FEIS, p. 8).

A comprehensive Soil Erosion and Sedimentation Control Plan will be implemented prior to the commencement of any grubbing, grading or construction on the site. This plan will remain in place and will be monitored and maintained for the duration of the construction process.

Much of the concern expressed at the numerous meetings held by the Planning Board on this proposal have been over potential impacts to the slope above Byram Lake, most of which is not located on the applicant's property.

The proposed Subdivision Plan indicates no construction on the steep slopes adjacent to Byram Lake. There will no blasting anywhere on the property. The nearest construction of any type would be the creation of a raised berm to intercept surface drainage which, at all points, is located at least 550 feet from the edge of

Byram Lake and is at least 150 feet from any slopes over 25% leading to Byram Lake, both distances measured horizontally.

The proposed residential subdivision and equestrian facility will change the nature of vegetative cover on various areas of the site. The runoff coefficients for the different areas have been carefully studied to determine that the proposed development will result in no significant change in the peak rate of runoff to Byram Lake. The runoff coefficient for the drainage area above the slope will not be significantly different from that which currently exists at that part of the site, thereby resulting in no significant change in the peak rate of runoff in those areas. Therefore, the modification of cover type will not influence the conditions of the slope.

As part of the overall Stormwater Management Plan for the proposed development, water will be diverted away from the eastern slope of the site so that the total volume of runoff that reaches Byram Lake via that slope will be less under post-development conditions than under pre-development conditions. However, the total volume of water reaching Byram Lake from all sources will remain unchanged. Where runoff is collected to a central point or discharged to a concentrated point, a level spreader or other device will be used to distribute the water from the detention pond across portions of the slope. This will reduce potential impacts to the slope.

2. Discussion and Findings

The Lead Agency finds that:

- Prior to the approval of the Preliminary Subdivision Plat, the Applicant will be required to submit for review and approval by the Planning Board of final plans concerning soil erosion and sediment control as well as a final stormwater drainage plan for the site.
- The Proposed Action will adequately avoid or mitigate potential impacts on topography and slopes.

C. Ground Water Resources

1. Impacts and Proposed Mitigation

Extensive hydrogeologic investigations have been conducted to evaluate the potential impacts to ground water quality and quantity, and to determine the extent of hydraulic connection between the site and Byram Lake. The hydrogeologic investigations included:

- Field geologic mapping;
- Fracture trace analyses;

- Well drilling and geologic logging;
- Geophysical surveying;
- Aquifer testing of four individual wells.
- Aquifer testing of four wells simultaneously;
- Ground water level monitoring on-site and off-site;
- Safe yield analyses; and
- Pesticide fate modeling.

The results of the hydrogeologic investigations, as presented in the DEIS, show conclusively that the bedrock aquifer underlying the Seven Springs property is hydraulically isolated from Byram Lake.

Analyses of fracture traces, geologic reconnaissance and geophysical surveying indicate that bedrock structure and fractures at the site run northeast to southwest. Groundwater elevations in monitoring wells adjacent to Byram Lake are over 200 feet above the lake level. Because the lake lies to the east of the site and because of the large difference between on-site groundwater elevations and lake levels, there is little evidence of a hydraulic connection between the fractured bedrock aquifer on the site and Byram Lake to the east.

A series of hydrogeologic investigations was conducted for the previously proposed golf course project to assess existing groundwater resources, to determine their ability to meet irrigation demands and to assess the potential effects of the project on neighboring wells. These investigations included drilling eight on-site test wells, individual and system pumping tests in four of the wells, geophysical surveying of the property to assess subsurface fracturing and evaluating the natural groundwater recharge that occurs on the site.

At the pumping rate of 160 gallons per minute (gpm) for the previously proposed golf course, no drawdown was observed in any of the neighboring wells monitored and there were no observed drawdown effects on Byram Lake. The irrigation, domestic and horse facility demands for the proposed subdivision and equestrian facility during the month of July, the worst case usage month, is approximately 19 gpm. Therefore, the combined pumping rate for the proposed residential subdivision and equestrian facility is substantially less than the originally proposed golf course.

The anticipated demand of the residential and equestrian proposal would utilize only 11 percent of the available annual recharge on the site. The peak water demand usage will occur in July when irrigation water demand is at its highest. Additionally, approximately 80 percent of the groundwater withdrawn for potable use will be recharged back to the aquifer through the use of on-site septic systems.

A Residential Lawn Management Plan (RLMP) was prepared for the project that outlines a site-specific program for the management of lawns through the controlled use of nutrient and pesticide applications (DEIS Appendix E). Further, 7.61 acres of the Bedford portion of the site will be permanently protected by conservation areas restricted by negative covenants and will remain undisturbed. Along with prescribed application schedules and procedures outlined in the RMLP, this open space will significantly reduce the potential for groundwater contamination. The final form of the RLMP is subject to the approval of the Planning Board.

A company owned by Donald Trump or its assignees will administer and enforce the RLMP, however, the declaration of covenants and restrictions will also grant the Town of Bedford the right to enforce the RLMP regulations. An annual report of the work performed in accordance with the RLMP will be filed each year with the Town. The Planning Board will require periodic testing of surface waters leaving the site as a part of the subdivision approval process. Violations of the approved RLMP may be cited by the Town enforcement officer and corrective action required.

2. Discussion and Findings

The Lead Agency finds that:

- The Applicant performed extensive water resources analyses of this site and the neighboring properties. These investigations, in conjunction with the Residential Lawn Maintenance Program (RLMP) developed for the project, were completed to determine the impacts of all facets of the proposed project on the Seven Springs site and surrounding areas and their suitability for the site. Results from the various analyses and predictive models used by the Applicant indicate that the proposed project will not adversely affect the ground water resource features on and around the Seven Springs property. The maintenance program specified in the RLMP will be continued indefinitely. Annual reports as specified in the RLMP will be submitted to the Town.

- The results of the groundwater risk assessment concluded that there are no predicted risks to the groundwater resources on or off the site. Therefore, there are no expected impacts due to groundwater discharges from the site to surface waters entering Byram Lake or the New Croton Reservoir. The Applicant's plan will not adversely impact ground water quality and/or quantity.

- As a condition of any subdivision approval, the Applicant will be required to permanently implement the proposed Residential Lawn Maintenance Program for the site.

- The Proposed Action will adequately avoid or mitigate potential impacts on ground water resources.

D. Surface Water Resources/Stormwater Drainage

1. Impacts and Proposed Mitigation

Surface water resources on the Bedford portion of the Seven Springs site consist mainly of surface and overland runoff in association with seasonal seeps and watercourses. One perennial watercourse, located in the southwesterly corner of the site, crosses a small portion of the site. An intermittent swale runs north to the property's border with Oregon Road through a small wetland. The property serves as the headwaters for three different drainage basins: the Byram Lake Reservoir watershed, the Kisco River watershed and the Wampus River watershed.

Byram Lake located just east of the site and is classified as a Class AA water body by NYSDEC. It serves as the drinking water supply for the Village of Mount Kisco and small areas in the Towns of Bedford and New Castle. Byram Lake is the headwaters for the Byram River, which ultimately discharges into the Long Island Sound. Approximately 118 acres of the total three-town site drain to Byram Lake. Approximately 80 acres of the site lie within the Kisco River Basin, which is part of the New York City Watershed. Approximately 15 acres of the site drains to the Wampus River and eventually to Long Island Sound.

The groundwater quality risk assessment conducted for the proposed development concluded that there are no predicted risks to the groundwater resources on or off the site. Therefore, it is concluded that there are no expected impacts due to groundwater discharges from the site to downstream surface waters.

Based on the proposed Subdivision Plan, impervious surface on the site will increase by approximately 4.5 acres. This figure includes potential tennis courts and swimming pools on each lot and is therefore conservative. Wooded areas will decrease by approximately 7 acres with most of these areas to be redesigned as landscaped and meadow areas as well as stormwater management facilities. The increases in the rate of stormwater runoff and associated potential adverse impacts will be managed and reclaimed (or eliminated entirely) through the implementation of a stormwater management plan. The stormwater plan includes a proposed stormwater basin on Lot B4.

The storm water plan has been designed to control post-development runoff through the entire range of storm events (1 year- through 100 year storms) based on Soil Conservation Service (SCS) methodology to avoid increased stream channel erosion, maintain the adequate of the existing drainage system, manage the increased runoff volume, minimize sedimentation into receiving waters and

not increase flooding of downstream properties. This plan will be approved by the Town of Bedford and the NYSDEP and will meet the requirements of the Town Stormwater Regulations and NYSDEC SPDES General Permit GP-0-08-001. Based on this plan, there will be no impact on receiving waters such as Byram Lake, the New Croton Reservoir and its tributary watercourses, wetlands streams and ponds.

Storm water runoff from the site flows to several environmentally sensitive water resource features that are on or adjacent to the site. These features include Byram Lake, surface watercourses, and on and off-site wetlands. Because of the existence of these water resource features, special attention has been devoted to managing the use of pesticides on the site through the development of a detailed Residential Lawn Maintenance Program (RLMP).

A surface water risk assessment was completed to provide a quantitative pesticide fate risk screening for the pesticides identified in the RLMP for use in the residential and equestrian development. Based on the results of that analysis, both management and engineering controls can be optimized and incorporated into the plan to effectively minimize or eliminate potential impacts to the water resource features on or adjacent to the property. The Planning Board will require periodic testing of surface waters leaving the site as a part of the subdivision approval process. In this manner, any measurable increase in pesticide loading from the site will be avoided.

During the construction period, a Soil Erosion and Sediment Control Plan specifically designed for the project will use temporary devices to control erosion and sedimentation.

2. Discussion and Findings

The Lead Agency finds that:

- The RLMP prepared for the proposed development outlines the anticipated dates and application rates of pesticide active ingredients to be used.
- Although surface water will be slightly redirected on the site, the basic drainage patterns of the site will be preserved. No surface water will be diverted from Byram Lake.
- Results from the various analyses and predictive models used by the Applicant indicate that the proposed project would not adversely affect the surface water resource features on and around the site.

- Steeply sloped portions of the site will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance.

  The erosion and sedimentation control plan and stormwater pollution prevention plan for the site will meet NYSDEC requirements and will be approved by the Town Engineer.

- The Applicant's plan will not adversely impact surface water quality or quantity. In addition, the Residential Lawn Management Plan established for the site will be sufficient to identify any surface water contamination.

- The Proposed Action will adequately avoid or mitigate potential impacts on surface water resources and stormwater conditions.

E. Wetlands

1. Impacts and Proposed Mitigation

The Bedford portion of the Seven Springs site currently contains approximately 0.43 acres of wetlands in two separate areas. These wetland areas are regulated by the Town of Bedford Freshwater Wetlands Law (Town Code Section 122) and also regulated by the United States Army Corps of Engineers (ACOE) in accordance with Section 404 of the Federal Clean Water Act (NYSDEC) in accordance with Article 24 of the New York State Environmental Conservation Law. The Bedford Wetlands Control Commission confirmed the wetlands delineations (DEIS IIID-2).

In addition, the site currently contains approximately 3.48 acres of 100-foot wetland/watercourse buffers regulated by the Bedford Wetlands Law. No areas of wetland buffer from wetlands in the Towns of New Castle or North Castle are present on the Bedford portion of the site.

Under the proposed Subdivision Plan, no disturbance to any wetland or wetland/watercourse buffer is proposed. To eliminate any potential disturbance, a defined limit of disturbance outside any regulated wetland or wetland/watercourse buffer will be established for each lot. The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board.

Strormwater runoff from the proposed development will not be discharged directly into wetlands and watercourses but will be retained, renovated and slowly released into the drainage system, thereby maintaining high water quality discharges from the property.

In response to the concerns regarding the adverse impacts from stormwater pollutants to the wetlands and watercourses during and after construction, the Applicant has prepared an Erosion and Sediment Control Plan, a Stormwater Pollution Management Plan, and a Residential Lawn Maintenance Plan (RLMP) that minimize stormwater impacts to wetlands and watercourses to the greatest extent possible. The RLMP will be administered and enforced by a company owned by Donald Trump or its assignee. Enhanced water quality protection measures will include reduced pesticide and fertilizer use under the RLMP and Best Management Practices (BMPs) to control nutrient run-off.

2. Discussion and Findings

The Co-Lead Agency finds that:

- The plan for the subdivision and equestrian facility proposes no disturbance to the existing wetlands, watercourses or wetland/watercourse buffers.
- Stormwater runoff from the proposed development will not be discharged directly into wetlands and wetland buffers.
- A 1.97-acre area around Wetland H will be permanently protected as a conservation area restricted by negative covenants controlling its use and maintenance.
- The Proposed Action will adequately avoid or mitigate potential impacts on wetlands.

F. Vegetation

1. Impacts and Proposed Mitigation

The vegetation communities on the site are divided into three broad categories: terrestrial cultural, forested uplands and wetlands. The terrestrial cultural communities encompass the highly developed and modified areas of the property. The forested uplands communities consist of common forest types and include a mix of second growth native, planted, and ornamental plant species. Vegetation associations indicative of wetland and watercourses make up a small portion of the site. Plant material on the property was identified and no rare, threatened or endangered plant species were observed or identified by regulatory authorities.

The proposed plan will require the clearing and grading of approximately 33.6 acres containing woods, orchards, open fields, scrub-shrub growth and estate landscape. The limits of clearing are based on preliminary grading plans prepared

for the subdivision shown in the DEIS (Plan BD-1) and assume a typical house size and location anticipated for this site. It is estimated that 875 trees with diameters over 8 inches will be removed during construction; of these, 105 trees are greater than 24 inches in diameter.

The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board. Within the areas of disturbance, the applicant will save as many trees, especially specimen trees, as can be feasibly incorporated into the landscape for the homes, but final landscape design will be each homeowner's decision, and so tree removal is an unavoidable impact of the proposed action. Tree removal permits are required as a part of Town of Bedford approval. The proposed plan will leave 58 percent of the site in a natural habitat condition and much of the disturbed portion of the site will be ultimately re-established. Therefore, a significant portion of the long-term impacts that would otherwise occur from the removal of existing vegetation will be mitigated.

Long-term impacts to vegetation will be minimal or non-existent in portions of the site that will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance. In addition, the use and disturbance of the area east of the berm on Lots B3, B4 and B5 will be regulated. Areas proposed to be converted from natural vegetation to lawn areas have the potential for adverse impacts, but these will be minimized through the implementation of the RLMP.

2. Discussion and Findings

The Lead Agency finds that:

- The removal of existing vegetation, including mature trees, is an unfortunate but unavoidable impact associated with development.
- Long-term impacts to vegetation will be minimal or non-existent in portions of the site that will be permanently protected as conservation areas restricted by negative covenants controlling their use and maintenance. In addition, the use and disturbance of the area east of the berm on Lots B3, B4 and B5 will be regulated. Areas proposed to be converted from natural vegetation to lawn areas have the potential for adverse impacts, but these will be minimized through the implementation of the RLMP. The Preliminary Grading and Limit of Disturbance Plans which establish the limits of disturbance are shown as Exhibits 3A-4, 3A-5 and 3A-6 in the DEIS and will be subject to final review and approval by the Planning Board. The Planning Board will review specific tree removal and

replacement as a part of the subdivision approval process. The Proposed Action will adequately avoid or mitigate potential impacts on vegetation.

G. Wildlife

1. Impacts and Proposed Mitigation

The site consists of a 80.5 acre parcel that contains a mixture of man-modified and natural ecosystems. Ecological communities currently on the site that provide wildlife habitat include wetlands (forested, scrub-shrub, emergent and meadow/old field), water bodies (streams and ponds), upland mixed hardwood forest, meadow/successional old fields and maintained lawn. Wildlife associated with the site is typical of those present on larger land parcels in Westchester County that display similar habitat characteristics. The NYSDEC Natural Heritage Program did not have any records of endangered or threatened species or critical habitats on the site.

Site investigations were conducted to identify the wildlife species present on, or with potential to utilize the property. The DEIS includes a list of natural and man-made habitats on the site as well as a matrix that documents each habitat type and its potential value to wildlife species that are potential inhabitants of the site. A specific study was conducted to determine if bog turtles were present on the site. No bog turtles, or other rare, threatened of endangered wildlife species were identified on the property. One Species of Concern, the Eastern Bluebird, was observed during the wildlife survey.

The proposed plan will result in temporary impacts to wildlife on the site. On a permanent basis, no significant habitat fragmentation or adverse impacts to rare, threatened or endangered species are anticipated. The plan does not include any permanent, impassable barriers to wildlife such as fencing in the conservation area, so a continuum of habitats will remain, allowing wildlife to pass through the site.

The proposed action includes the introduction of nesting boxes within and at the edge of open growth areas to provide additional habitat features for the Eastern Bluebird, as well as provide nesting sites for tree swallows.

Since the Indiana bat is assumed to occupy or use the site for foraging or roosting, the applicant proposes to limit forest-clearing activities to between October 1 and March 30, the bat's hibernation period, when they will not be present on the site. Consultation with the United States Fish and Wildlife Service concurred that this restriction would avoid direct impacts on the bat and also did not anticipate impacts on the bog turtle (DEIS, p. I-16)

Concerns were expressed during the SEQRA process regarding impacts that development of the site would have on wildlife species and wildlife habitats, impacts to the adjacent nature preserve and wildlife corridors, disturbance to wetland buffers, increasing Canada geese populations, and impacts to wildlife on neighboring residential properties.

In response to the concerns regarding wildlife and wildlife habitats, a limit of disturbance line has been designed to minimize impacts to vegetation and wildlife habitats to the greatest extent practicable. This limit is shown on the plan entitled "BD-1 Development Plan – Bedford," dated 3/31/05, prepared by TRC Engineers, Inc.

In response to the concerns regarding possible impacts to the nearby nature preserve and wildlife corridors, the plan will preserve 5.24 acres of wooded land adjacent to the Byram Lake in perpetuity. Larger animals, such as deer, will continue to utilize the preserved wooded areas as well as other parts of the site as travel corridors during dusk and dawn hours. No fences that could block the movement of small animals and amphibians across the landscape will be used.

In response to concerns regarding potential impacts of wildlife on neighboring residential properties, a measurable increase in wildlife use of neighboring properties is not anticipated to occur as a result of the implementation of the revised site plan. The majority of the animals that are displaced by activities associated with the proposed development will relocate to the undisturbed wooded portions of the site and the adjacent nature preserves. The larger animals, such as deer, will continue to frequent the property.

2. Discussion and Findings

The Lead Agency finds that:

- A limit of disturbance line has been designed to minimize impacts of vegetation and wildlife habitats on the site to the greatest extent practicable, and the proposed site plan has been designed so that no measurable impacts will occur to wildlife populations on adjacent properties.

- The proposed development will not impact Federal or State rare, endangered or threatened wildlife species or communities.

- The Proposed Action will adequately avoid or mitigate potential impacts on wildlife.

H. Traffic and Transportation

1. Impacts and Proposed Mitigation

Access to the proposed residential subdivision and equestrian facility will be from Oregon Road, a public street in the Town of Bedford. New Lot B1 and the Nonesuch lot (B2) will each have a new private driveway entering Oregon Road.

A proposed new private road intersecting with Oregon Road and following the route of the existing driveway, will serve the remaining six lots, the equestrian facility and the existing estate house in North Castle. This road will end within 75 feet of the southerly property line. The design of the turnaround will be determined by the Planning Board in consultation with the emergency service providers serving the site during the subdivision review process. A separate parcel of land approximately 0.17 acres in area will be dedicated to the Town of Bedford at the end of the private road. This layout is shown on the subdivision plan, included in the FEIS, entitled "Seven Springs – Preliminary Subdivision Plat (Bedford)," dated 7/3/08, prepared by Donnelly Land Surveying.

Chapter 107 of the Bedford Land Subdivision Regulations limits the length of a dead end road to that serving not more than 15 houses unless waived by the Planning Board. Oregon Road currently serves nine existing homes in addition to two existing homes on the Seven Springs site (Nonesuch and the Meyer estate house). With the proposed seven new homes, a total of 18 homes would use Oregon Road. Because the subdivision application in North Castle was withdrawn, no alternative entrance exists for the Proposed Action.

The applicant has agreed that the new road will not be extended or used for access to the North Castle portion of the site except for access to the existing estate home. If, in the future, the North Castle portion of the site is developed with a primary access from North Castle, the Bedford Planning Board may grant amended subdivision approval specifically permitting a connection to create a through road. Any other scenario would violate the Town of Bedford regulations for dead-end roads. This agreement will be a covenant in the recorded declaration of the homeowner's association that will be formed by the applicant.

A Traffic Impact Analysis was prepared for the prior proposed 17 lot subdivision by John Collins Engineers presented in the DEIS and updated in the FEIS and included 27 intersections. The analysis identified base traffic volumes, expanded base volumes to reflect background traffic conditions for a design year and combined traffic volumes, which included other developments, typical growth factors and estimates for site-generated traffic for the proposed use.

The proposed subdivision will generate up to 7 entering vehicles and 2~~3~~1 exiting vehicles during the weekday AM peak hour and 18 entering and 10 exiting vehicle during the weekday PM peak hour. The additional traffic generated by the

proposed project is not expected to significantly change traffic operations in the vicinity of the site and will not result in significant increase in levels of service, traffic conditions or deterioration in operating conditions. Accordingly, no traffic mitigation is proposed.

Proposed road pavement with for the new private road is 20 feet, within a 50 foot wide right-of-way. This road width is narrower than the standard width of 24 feet cited in the Town Subdivision Regulations. The narrower width will reduce environmental impacts including less tree removal, less impervious surface, less cut and fill and preservation of more of the existing stone wells on the site. No sidewalks or street lights are proposed on the new private road.

A detailed analysis was prepared by the Applicant to evaluate construction traffic and impacts on area roadways. It has been determined by the Applicant that all construction traffic will follow one specific access route. All trucks will access the area from N.Y. Route 117 and follow Byram Lake Road to access Oregon Road and the site driveway. Construction traffic will be directed not to use Sarles Street or Byram Lake Road around Byram Lake. The major stream crossing under Byram Lake Road was reinforced previously to accommodate construction traffic to the Village of Mount Kisco water treatment plant and, therefore, this road should be able to safely handle the construction traffic anticipated from this project.

The Applicant has agreed to prohibit heavy construction vehicles from using Byram Lake Road during its use by school buses. Flagmen will be posted at critical areas for safety of the public during any movement of trucks other than isolated single trucks.

The impact of construction traffic to trees along the construction route was discussed in the DEIS (IIIE-9,10) and trees over 24" dbh were mapped in Figure #E-5. The DEIS concludes that construction vehicles will not damage these trees (DEIS IIIE-26). The Applicant will be responsible for any damage to area roadways or trees caused by construction traffic. To protect the Towns affected, appropriate insurance, bonding or escrow funds will be established to cover these costs.

Discussion and Findings

The Lead Agency finds that:

- Site access is proposed via Oregon Road in the Town of Bedford. All vehicles will generally access Oregon Road and the site access drive via N.Y. Routes 22 and 172, Sarles Street, Byram Lake Road and other local roadways.

- Results of the traffic capacity analysis show that each intersection studied would continue to operate at the same Level of Service with or without site traffic.

- Construction traffic will be required to access the site from N.Y. Route 117 and travel south on Byram Lake Road to Oregon Road and enter the site via the main access drive. The Applicant will repair any damage that occurs to roads or trees due to construction vehicles as required by each municipality. Construction traffic will be limited and delivery times will be specifically directed to prohibit use of local roads during their use by school buses. Flagmen will be used to control truck traffic.

- There will be no use or landing of helicopters on the site as part of the proposed development, or at any time in the future, except for emergency medical purposes.

- The Proposed Action will adequately avoid or mitigate potential impacts on traffic.

I. Land Use and Zoning

1. Impacts and Proposed Mitigation

Land uses surrounding the site include mostly low-density single-family residential development and open space. Open space areas include the Eugene and Agnes Meyer Nature Preserve, Merestead County Park and Byram Lake.

The zoning of the site and surrounding lands in the towns of Bedford and North Castle is R-4A, permitting single-family development on lots of four acres or more. Zoning in the Town of New Castle is R-2A, permitting lots of two acres in size.

The primary land use impact resulting from the proposed development of the site will be a change from the present vacant residential estate to a residential development with an equestrian facility, staff housing facility and reused historic farm buildings. The proposed use is consistent with the recommendations of the Bedford Comprehensive Plan of 2003 and the Westchester County Plan – Patterns for Westchester.

The proposed density of the project is well below that permitted by existing zoning. All new homes will be built in accordance with all dimensional requirements of the Zoning Law, except for Lots B2 and B5 that will need variances from the maximum building coverage requirement. A variance will also be required for the staff housing use. The Bedford Zoning Law currently permits

the equestrian facilities as a Special Permit Use. The proposed facility must receive this permit from the Planning Board.

The proposed private road will require a waiver for the reduction in road pavement width from 24 feet to 20 feet and for the maximum permitted length of a dead end road. Chapter 107 of the Bedford Land Subdivision Regulations limits the length of a dead end road to that serving not more than 15 houses unless waived by the Planning Board. Oregon Road currently serves nine existing homes, in addition to two existing homes located on the Seven Springs property (Nonesuch and the Meyer estate home). With the proposed seven new homes, a total of 18 homes would use Oregon Road.

Overall, the impacts to zoning and land use will not be significant. The proposed density within the Town of Bedford will be one house per ten acres. The development is therefore compatible with the low-density residential and open space land use and zoning of the surrounding area, as well as local land use plans. Therefore, no mitigation measures are proposed with respect to land use and zoning. The proposed plan includes 7.61 acres of conservation area, almost ten percent of the site area.

2. Discussion and Findings

The Lead Agency finds that:

- The proposed residential subdivision and equestrian facility is consistent with applicable zoning and land use regulations of the Town of Bedford.

- The Proposed Action is compatible with the recommendation of the Comprehensive Plans for the Town of Bedford and Westchester County.

- The Proposed Action will adequately avoid or mitigate potential impacts relating to land use and zoning.

J. Community Facilities and Services

1. Impacts and Proposed Mitigation

The property is served by the Mount Kisco Fire District and Mount Kisco Lions Volunteer Ambulance Corps for fire and emergency medical services, respectively. Police services are provided by the Town of Bedford. In general, the Proposed Action will require an increase in community services compared to

the current demand by the existing site use. Throughout the environmental review of the proposed residential development and previous golf course development, the Lead Agency has received comments from representatives of the emergency service providers indicating that police, fire and ambulance services currently serving the site would have some difficulty providing adequate levels of service for the Proposed Action (DEIS Appendix P). However, all of these comments pre-date the elimination of the nine lots proposed in the Town of North Castle that reduced the scale of the project.

The Bedford Police Department expressed concern for the ability to serve the area due to increasing development in the area, rising department costs and the desirability of an alternate entrance to the site.

The Mount Kisco Fire Department expressed concern with the lack of water supply for firefighting and also would prefer a secondary access route to the site. The applicant has proposed to equip each home with an indoor sprinkler system fed by a storage tank. In addition, the proposed detention pond will have 310,000 gallons of water in its permanent pool that can be accessed from a dry hydrant.

No comments were received from the Mount Kisco Lions Volunteer Ambulance Corps.

A secondary access to the site is not available at this time. The HOA will own and operate standard snow removal equipment as well as chain saws and other tools necessary to clear blocked roadways. The equipment will be stored on site and will be available to the HOA staff for use in emergencies and serious weather conditions.

The new development is estimated to generate a minimum of $500,000 in tax revenue to all non-school taxing jurisdictions (DEIS III-I-9), and therefore provide revenue substantially in excess of any additionally needed service costs.

The Proposed Action includes no community-wide water or sewerage facilities. Sewage disposal will be provided by individual on-site septic systems for each residence. Water supply will be provided by an individual well for each residence. No future public water or sewer services are expected due to the great distances and costs involved in extending existing service lines.

Because the new road would be privately owned, no municipal snow plowing or road maintenance will be provided. Solid waste will be hauled away by private contractors.

The proposed homes and equestrian facility will incrementally increase demand for electricity, telephone and cable services at the site, although no significant impacts to these utilities are anticipated.

The Bedford portion of the site is currently located in the Bedford Central School District. Using standard analyses for determining population from residential development, the Proposed Action is estimated to increase enrollment in the Bedford Central School District by 12 students. This increase is minor and is expected to be accommodated by existing service levels and resources. The new tax revenues anticipated from the project are expected to provide $2,195,082 in tax revenue to the school district. This figure is significantly higher than the costs to educate the number of students generated by the development.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will not have a significant adverse impact on the police, fire or ambulance services. Tax revenues generated by the new development are expected to offset the incremental increase over time in the cost of providing these services.
- Subject to receiving necessary approval from other permitting authorities, the requirements for potable water and irrigation water for the proposed development will be met by wells. Therefore, existing public water supply systems will not be impacted by the Proposed Action.
- Subject to receiving necessary approvals from other permitting authorities, the Applicant will use on-site sewage disposal systems for the proposed development. Therefore, municipal sewerage facilities will not be impacted by the proposed development.
- The Proposed Action will adequately avoid or mitigate potential impacts on community facilities and services.

K. Historic, Archaeological and Cultural Resources

1. Impacts and Proposed Mitigation

Compared to the impacts associated with the originally proposed golf course plan, the cultural resources that are proposed to be disturbed under the residential subdivision and equestrian facility have been substantially decreased.

Representatives from the New York State Office of Parks, Recreation and Historic Preservation (NYSOPRHP) visited the site in May 2000 during the previous golf course application and determined that the former Seven Springs property meets the eligibility criteria for inclusion in the National Register of Historic Places. NYSOPRHP identified a number of structures and features throughout the site that contributed to this conclusion. In addition, NYSOHPRHP determined that the Nonesuch complex is also eligible for inclusion in the National Register of Historic Places.

Stage 1 archaeological testing was conducted over the entire site and revealed Native American and historic era sensitivity in eight loci. Stage 1A assessments were completed in 1998 (DEIS Appendix R). Stage 2 archaeological field investigations were completed in two areas in Bedford and the technical reports accepted by NYSOPRHP. These reports concluded that no further excavations were warranted in the side yard of Nonesuch (Area 6 Locus 1). However, Area 14 Locus 1, along the easterly side of the main driveway west of the secondary barn complex, was determined to have the potential to yield important prehistoric information. This area is eligible for listing in the New York State and National Registers of Historic Places (10/13/04 Correspondence from NYSOPRHP, DEIS Appendix S). Under applicable state and federal regulations, the applicant must either avoid or mitigate impacts to this area. The Proposed Action avoids these impacts by placing the area within a conservation area restricted by negative covenants.

The Proposed Action calls for the re-use of all but two of the existing structures on the site. Nonesuch and the Meyer estate house will continue to be used as single-family homes. Renovations to these historic structures will involve only minimal interior alteration. The exterior of the buildings will not be altered and the original exterior details will be refurbished to protect the architectural integrity of the structures.

The carriage barn and the modern tool shed will be removed. Demolition of the carriage house is under the jurisdiction of the Bedford Historic Building Preservation Commission and will require their approval.

Other buildings and features to be preserved include the Nonesuch gardens, stone garage, large caretaker's house, secondary barn complex and small caretakers house, the stone water tower, greenhouse and two root cellars. On the equestrian facility lot, the white farmhouse, caretaker's cottage and main barn complex will remain. The carriage barn is proposed for demolition and a new staff housing facility built in its place. The proposed new private road follows the route of the original estate driveway and will minimize disturbance to trees and stone walls. In addition, almost all of the stone walls on the site will relocated, repaired or rebuilt.

2. Discussion and Findings

- Most of the historically significant buildings on the site will be restored and preserved as a result of this project.
- Only one historic building, the carriage house, will be removed under the Proposed Action. The demolition of this building will require the approval of the Bedford Historic Building Preservation Commission.
- One area determined to have potential archeological significance, Area 14 Locus 1, will be permanently preserved within a easement.
- The Proposed Action will adequately avoid or mitigate potential impacts on historic, archaeological or cultural resources.

L. Visual Resources

1. Impacts and Proposed Mitigation

The Proposed Action will alter the visual character of the site from one characterized by an estate landscape of open fields, farm buildings and forested areas to one predominantly characterized by large, single-family residences on large lots. The farm structures around the white farmhouse will be retained and maintain the visual character of the majority of the property seen to the east of the main driveway.

The only structures that can be presently seen from outside of the site are Nonesuch house, visible from Oregon Road, and the Meyer estate mansion, the roof of which can be seen during winter months from I-684. Views of these structures are not anticipated to change significantly.

Views of the site from most of the surrounding area will not be impacted due to the topography and vegetation of the site. The conservation area on most of the perimeter of the site will assist in maintaining the densely wooded character seen from the east. Views of the eastern portion of the site from Route I-684 and nearby residences surrounding Byram Lake will be minimally changed by the Proposed Action, although the tops of homes on Lots 3, B4 and B5 may be seen. The portion of the site most visible from these locations is currently maintained as mowed lawn area surrounded by a wooded buffer that is proposed to remain. Similarly, the southern and southwestern portions of the site will maintain their existing views with wooded buffers proposed along the perimeter of the property.

Site frontage on Oregon Road will remain the same, except that the new residences on Lots B1 and B8 and the new driveway to Nonesuch will be seen. The nearest residential neighbors on Oregon Road will have views of new homes on Lots B1, B3, B7 and B8. However, these views will be screened by the

existing dense wooded buffers existing on the property. These buffers will be protected by the limits of disturbance shown on the proposed subdivision plan and discussed in Section E of this Findings Statement.

The addition of seven new homes on the site is not anticipated to significantly contribute to light pollution. No street lighting is proposed and all lots will comply with the lighting requirements of the Bedford Code. This regulation does not permit the exterior illumination of buildings and limits off-site light spillage to low levels.

2. Discussion and Findings

The Lead Agency finds that:

- When subdivision approval is sought, the Applicant will be required to specifically identify the trees to be protected during construction and to remain on site. Additionally, the establishment of clearing and grading limit lines will be required when determined necessary by the Town to preserve the visual and environmental resources of the site. When the plan is refined for approval purposes, emphasis should be placed on screening the site from the view of adjacent properties and streets and re-vegetating those areas disturbed during construction.
- The proposed single-family residences to be located on Lots B1, B3, B7 and B8 will be visible from adjacent residences and Oregon Road. This development is consistent with the current neighborhood character and existing zoning, and will not have an adverse environmental impact.
- The Proposed Action will adequately avoid or mitigate potential impacts on visual resources.

M. Noise

1. Impacts and Proposed Mitigation

The Applicant has conducted a detailed noise analysis and has modeled the anticipated noise levels associated with the proposed use (DEIS IIIL-1). The noise assessment included background noise monitoring at six selected noise sensitive receptors in order to characterize the existing noise environment.

No mitigation measures will be required for noise from the completed project since no noise impacts as expected.
Temporary noise impacts from construction activity are anticipated. Noise associated with construction activities will include, but not be limited to, noise from worker vehicles, construction equipment, delivery vehicles, construction activity such as clearing vegetation, grading, loading and unloading of trucks, and

building of structures. The short-tern nature and small, expected magnitude of the construction noise do not warrant any mitigation measures.

The applicant has stated that construction activities that will create noise in excess of the permitted decibel levels will be conducted during midday hours and will not take place during weekends or holidays. As a good construction practice to reduce construction noise to the greatest extent possible, and practical, functional mufflers will be maintained on all construction equipment. Construction activities on the site will comply with the noise requirements of Chapter 83 of the Bedford Code.

2. Discussion and Findings

The Lead Agency finds that:

- No negative noise impacts from the completed project are expected.
- Noise during construction will consist of noise from vehicular traffic, construction equipment, delivery vehicles, power tools, and construction activity. Noise levels associated with the construction activity will comply with all requirements of the Town noise ordinance. Construction activities that will create noise in excess of the permitted decibel levels will be conducted during midday hours and will not take place during weekends or holidays.
- There is no further practical mitigation that could eliminate or significantly reduce the noise associated with the Proposed Action. The Proposed Action will adequately avoid or mitigate potential impacts relating to noise.

N. Air Quality

1. Impacts and Proposed Mitigation

The air quality analysis conducted for the Proposed Action evaluated the potential ambient air quality impacts of the project against the applicable standards for those pollutants for which a National Ambient Air Quality Standard (NAAQS) exists. Currently, the United States Environmental Protection Agency USEPA) and the NYSDEC enforce ambient air quality standards for seven pollutants.

A review of existing air quality showed that of the seven pollutants, USEPA classified them all at attainment levels or better, except for particulate matter with a diameter less than 2.5 microns which has not been determined, lead which is not designated and ozone which has severe non-attainment.

With the Proposed Action, a minor increase in emissions is anticipated for the increase in vehicular traffic associated with the action, and for an increase in the

utilization of gasoline and diesel-powered maintenance equipment. Short-term impacts to air quality from the proposed development were associated with fugitive dust from the active construction areas and from emissions from construction equipment.

In accordance with the NYSDSDOT EPM (NYSDOT, 2001), emissions of inhalable particulate matter will be mitigated through the use of wetting of exposed soil. Covered trucks for soils and other dry materials, and controlled storage of spoils on the construction site. No impacts are anticipated due to heating and cooling systems emissions. It was also found that a refined air quality modeling analysis is not required for any of the studied intersections, and it can be concluded that it is highly unlikely that the project will violate the CO NAAQS.

No mitigation measures are proposed for the minimal increase in air pollutants from the completed project.

2. Discussion and Findings

The Lead Agency finds that:

- The Proposed Action will adequately avoid or mitigate potential impacts on air quality.

O. Alternatives

The DEIS studied two alternative development plans for the Seven Springs site: 1) a conventional 17 lot single-family subdivision maximizing the use of the property with four acre lots, and 2) a cluster subdivision with 17 single-family lots ranging in size from 2.1 to 5.3 acres.

Table IV-2 in the DEIS compares and summarizes the impacts of the Proposed Action and the alternative plans in the following categories: geology and soils, topography and slopes, water resources, wetlands, vegetation, wildlife, traffic, land use and zoning, community facilities and services, utilities, cultural resources, visual resources, and air and noise.

As shown in the comparison table, both of the alternatives would have greater environmental impact on the site than the Proposed Action. The increased environmental impacts from the two alternative plans are due mainly to the increase in number of lots from 9 to 17. However, these alternatives would also require the removal of most of the existing buildings on the site, and therefore result in an important loss of cultural resources.

Comments on FEIS

The Lead agency has received correspondence from four parties regarding the FEIS. The comments of the Lead Agency on this correspondence follow.

1. Letter dated 4/28/09 from the New York City Department of Environmental Protection (NYCDEP). A Stormwater Pollution Prevention Plan (SWPPP) including an erosion control plan will be prepared by the applicant as a part of the preliminary subdivision review process. This plan must be reviewed and approved by NYCDEP. Wetlands delineations were confirmed by Bedford authorities (FEIS 16). The applicant has replied to the NYCDEP comments in a letter dated 5/5/09 and has provided a response dated 5/4/09 from his engineering consultant, Woodard & Curran, to these items.

2. Letter from Marc Viscusi dated 4/24/09. Issues of rock blasting and protection of the slopes over Byram Lake have been fully discussed in the FEIS (33-38). The applicant has responded to the Viscusi letter in a letter dated 5/5/09 and has provided a letter dated 5/4/09 from his engineering consultant, Woodard & Curran, also responding to the items in this letter. The Lead Agency has determined that the proposed plan will not have a negative impact on these slopes.

3. Letter from the Croton Watershed Clean Water Coalition dated 4/28/09. Issues regarding the export coefficients for phosphorous will be addressed in the SWPPP approved as a part of the preliminary subdivision. This plan must be approved by the NYSDEC, NYCDEP and the Town Engineer. The RLMP proposed by the applicant may be enforced by the Town of Bedford. In addition, testing of surface water flow will monitor the effectiveness of the RLMP.

4. Letter from the Town of New Castle dated 4/30/09. The issues of construction traffic routes and impacts are discussed in detail in the DEIS (IIIG-39-43). The Applicant will be responsible for any damage to area roadways or trees caused by construction traffic. To protect the Towns affected, appropriate insurance, bonding or escrow funds will be established to cover these costs.

General Findings

The Lead Agency finds that:

- The Lead Agency has given due consideration to the Draft and Final Environmental Impact Statements (EISs) as well as to comments received on the FEIS including 1) letter from the NYCDEP dated 4/28/09, 2) letter from Marc

Viscusi dated 4/24/09 and previous letters dated 7/23/08, 7/28/08, 8/6/08, 8/25/08, and 8/29/08, 3) letter from the Croton Watershed Clean Water Coalition dated 4/28/09 and 4) letter from the Town of New Castle dated 4/30/09 and has considered the written facts and conclusions contained herein.

- This Findings Statement has been prepared pursuant to and as required by 6 NYCRR Part 617.
- Consistent with social, economic and other essential considerations from among the reasonable alternatives available, the Proposed Action minimizes or avoids adverse environmental effects to the maximum extent practicable.
- Consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X

SEVEN SPRINGS, LLC

Plaintiff,

AFFIDAVIT OF SERVICE

-against-

Index No.: 21162/09

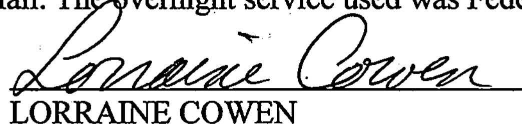
THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendants.
---X

STATE OF NEW YORK)

COUNTY OF WESTCHESTER) ss:

LORRAINE COWEN, being duly sworn, deposes and says: I am not a party to the action: I am over the age of 18 years old; I reside in Scarsdale, New York and on February 19, 2010, I served a copy of the within Reply affirmation in Further Support of Defendants' Motions to Dismiss and in Opposition to Plaintiff's Cross-Motion upon the parties listed below annexed hereto by mailing same by overnight delivery and E-Mail. The overnight service used was Federal Express.



LORRAINE COWEN

Sworn to before me this
19th day of February, 2010.

NOTARY PUBLIC

STUART E. KAHAN
Notary Public, State of New York
No. 02KA4769001
Qualified in Westchester County
Commission Expires June 30, 2010

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Index No. 21162/09 *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SEVEN SPRINGS, LLC,

Plaintiff,

- against -

THE NATURE CONSERVANCY, ROBERT BURKE,
TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

REPLY AFFIRMATION IN FURTHER SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER LLP
Attorneys for Defendants Noel B. Donohoe and Joann Donohoe

120 BLOOMINGDALE ROAD
SUITE 100
WHITE PLAINS, NY 10605
(914) 422-3900

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: .... Signature ....

Print Signer's Name..

Service of a copy of the within *is hereby admitted.*

Dated:

....
Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY — *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT — *that an Order of which the within is a true copy will be presented for settlement to the Hon.* *, one of the judges of the within-named Court, at*
on *20* *, at* *M.*

Dated:

OXMAN TULIS KIRKPATRICK WHYATT & GEIGER LLP
Attorneys for

120 BLOOMINGDALE ROAD
SUITE 100
WHITE PLAINS, NY 10605

To:

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

☐ Attorney's Certification — certify that the annexed
has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for
. I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

(Check Applicable Box)

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:
being sworn says: I am

☐ Individual Verification — in the action herein; I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of
a corporation, one of the parties to the action; I have read the annexed
know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

(Check Applicable Box)

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20

....
(Print signer's name below signature)

....

STATE OF NEW YORK, COUNTY OF ss:
being sworn says: I am not a party to the action, am over 18 years of age and reside at
On , 20 , I served a true copy of the annexed
in the following manner:

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Facsimile — by transmitting the same to the attorney by facsimile transmission to the facsimile telephone number designated by the attorney for that purpose. In doing so, I received a signal from the equipment of the attorney served indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) as indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means upon the party's written consent. In doing so, I indicated in the subject matter heading that the matter being transmitted electronically is related to a court proceeding:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed, the address having been designated by the addressee(s) for that purpose or, if none is designated, to the last-known address of addressee(s). Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

(Check Applicable Box)

Sworn to before me on , 20

....

....
(Print signer's name below signature)

FILED
JUN 25 2010
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--X

SEVEN SPRINGS, LLC

Plaintiff,

Index No.: 21162/09

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.
--X

RECEIVED
FEB 23 2010
CHIEF CLERK
WESTCHESTER SUPREME
AND COUNTY COURTS

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF NOEL B. DONOHOE AND JOANN DONOHOE'S MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION

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(914) 422-3900

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--X
SEVEN SPRINGS, LLC,

Plaintiff, Index No. 21162/09

- against –

THE NATURE CONSERVANCY,
ROBERT BURKE, TERI BURKE,
NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.
--X

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF NOEL B. DONOHOE AND JOANN DONOHOE'S MOTION TO DISMISS THE COMPLAINT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION

PRELIMINARY STATEMENT

This reply memorandum of law is submitted on behalf of defendants Noel B. Donohoe and Joann Donohoe (the "Donohoes")[1] in further support of their motion to dismiss and in opposition to Seven Springs' cross-motion for leave to serve an amended complaint pursuant to CPLR 3025. In the interest of judicial economy, the Donohoes will not repeat herein the well-stated arguments contained in the reply memoranda submitted on behalf of co-defendants TNC and the Burkes. Instead, this reply memorandum will concentrate on the one question not discussed by the other co-defendants, to wit: whether, based upon the doctrine of collateral estoppel, the Court should deny Seven Springs' cross-motion because the amended complaint that it seeks leave to serve raises issues which were previously considered by Justice Rory J. Bellantoni in *Seven Springs I*. Justice Bellantoni, before he granted the injunction, carefully

---

[1] Unless otherwise noted herein, all terms herein shall be defined in the same manner as set forth in the Memorandum of Law in Support of Noel B. Donohoe and JoAnn Donohoe's Motion to Dismiss the Complaint dated December 11, 2009 ("Donohoe Mem.") previously submitted in support of the Donohoes' dismissal motion.

examined the issues of the appropriateness of a preliminary injunction and the amount of monetary damage that Seven Springs might suffer in the event it ultimately were determined that TNC had no right to an injunction.

By bringing a new action which asks this Court to consider whether Defendants have interfered with Seven Springs' alleged easement right by seeking a preliminary injunction, Seven Springs is essentially asking this Court to reconsider the identical issue already decided in *Seven Springs I, i.e.,* whether TNC was entitled to the issuance of a preliminary injunction. Further, by now seeking some $90,000,000 in damages, Seven Springs is effectively asking this Court to reconsider the issue of whether the amount of the undertaking that Justice Bellantoni required TNC to post in *Seven Springs I* sufficiently covered any damages claim. The doctrine of collateral estoppel precludes the assertion of these previously considered issues in a new action.

If Seven Springs genuinely thought that Justice Bellantoni erred when he issued the Injunction Order, it should have perfected its appeal with respect thereto. Having failed to perfect its appeal, Seven Springs is bound by the terms of the Injunction Order and cannot now avoid the consequences of its prior inaction by commencing a new lawsuit which effectively asks a new judge to reconsider issues previously decided against it.

STATEMENT OF FACTS

The relevant facts are set forth in the accompanying Reply Affirmation of Lois N. Rosen dated February 19, 2010 ("Rosen Reply Aff.") and are not subject to material dispute. In or about March 2008, co-defendant TNC made a motion for a preliminary injunction (with temporary restraining order). Justice Bellantoni heard extensive oral argument with respect to both the temporary restraining order and the injunction on March 18, 2008 and again on April 4, 2008. (*See* Rosen Reply Aff., Exhibits A and B.) before he issued the Order Granting

Preliminary Injunction filed and entered on April 14, 2008 (the "Injunction Order"; *see* Benowich Affirmation, Exhibit 3). By order filed and entered on April 14, 2008 (the "Injunction Order"), Justice Bellantoni enjoined Seven Springs from entering upon Lower Oregon Road with any vehicle, equipment or machinery and for any other purpose than walking or hiking thereon. In addition, Seven Springs was enjoined from performing any work upon Lower Oregon Road, such as removing vegetation or grading the roadbed. As a condition of the injunction, TNC was required to post an undertaking in the amount of $100,000. The undertaking was thereafter timely posted. (*See* "Notice of Filing Undertaking – CPLR 6312"; Rosen Reply Aff., Exhibit C.)

After the injunction was issued, Seven Springs filed a Request for Appellate Division Intervention ("RADI") and a Notice of Appeal dated May 8, 2008. (*See* Rosen Reply Aff., Exhibit D.) In the RADI, Seven Springs set forth the issues to be raised on appeal as follows:

> Whether the Court below erred in granting TNC's motion?
>
> Whether TNC demonstrated its right to injunctive relief by establishing a likelihood of success on the merits, irreparable harm and a balancing of the equities in its favor?
>
> Whether the lower court erred in limiting the amount of the undertaking required to be filed by TNC to 100,000.00?

The RADI makes it clear that Seven Springs sought to raise on appeal the very same issues that it seeks to raise herein, *i.e.,* "[w]hether TNC demonstrated its right to injunctive relief" and "[w]hether the lower court erred in limiting the amount of the undertaking required to be filed by TNC to 100,000.00.

On or about December 26, 2008, the Appellate Division, Second Department, entered an order granting Seven Springs' application to enlarge the time to perfect its appeal until February 6, 2009. (*See* Rosen Reply Aff., Exhibit E.) Seven Springs thereafter failed to perfect its appeal.

ARGUMENT

SEVEN SPRINGS IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL FROM RAISING ISSUES IN THIS LAWSUIT WHICH WERE ALREADY DETERMINED IN *SEVEN SPRINGS I*

The Court of Appeals decision in *Buechel v Bain,* 97 NY2d 295, 303-04 (2001) sets forth the general rules relating to the applicability of the doctrine of collateral estoppel:

> The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules. *Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party* or those in privity. The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result.
>
> Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination. (citations omitted)(emphasis added)

"The doctrine of collateral estoppel is 'intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Westchester County Correction Officers Benev. Ass'n v County of Westchester,* 65 AD3d 1226 [2d Dept 2009], *citing, Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co.,* 60 AD3d 897, 899 [2d Dept 2009[, *quoting Luscher v Arrua,* 21 AD3d 1005, 1007 [2d Dept 2005]).

In *Honess 52 Corp. v Town of Fishkill,* 266 AD2d 510, 511 (2d Dept 1999), the appellate court concluded that the doctrine of collateral estoppel barred a plaintiff from relitigating in a new action matters which had clearly been "raised and decided against it in the prior CPLR Article 78 proceeding *and which could have been raised on the appeal from that judgment"*

[emphasis added]; *see also, CRK Contracting of Suffolk, Inc v Jeffrey M. Brown & Associates, Inc.*, 260 AD2d 530 (2d Dept 1999).

These principles of collateral estoppel clearly bar Seven Springs from raising issues herein which could have been (and in fact were) raised and decided in *Seven Springs I.* Not only are the issues in the two cases the same; the parties to the two cases are the same as well. Seven Springs had a full and fair opportunity to contest the prior determinations – and it opposed TNC's motion vociferously at both the two oral arguments and in its written opposition. If collateral estoppel were not held to bar the amended complaint, there would be a real danger of inconsistent results – a danger particularly acute herein since *Seven Springs I* remains pending.

Leave to amend should be denied for an additional reason as well. When Seven Springs abandoned its appeal in *Seven Springs I,* it effectively made a choice to allow the Injunction Order to remain in place until the conclusion of the first litigation (*see Blue Chip Mortgage Corp. v Strumpf,* 50 AD3d 936 [2d Dept 2008][where a party timely fails to perfect its appeal in accordance with court rules, a dismissal of that appeal constitutes an adjudication on the merits with respect to all issues which could have been reviewed on the appeal]. It made this choice knowing that, as a matter of law, the amount of any monetary damages that it could recover in the event all issues were ultimately adjudicated in its favor was limited to the amount of the undertaking, or $100,000 (*Bonded Concrete, Inc. v Town of Saugerties,* 42 AD3d 852 [3d Dept 2007]["if it is ultimately determined that a party was not entitled to an injunction, recovery of resulting damages attributable to the injunction will be limited to the amount of the undertaking as fixed by the court"][citations omitted] *Gross v Shields,* 130 Misc2d 641, 644-45 [Sup Ct NY Co 1985]["A reason given for limiting damages to the undertaking was that 'a plaintiff ... has the opportunity, if he thinks the security excessive, to abandon his injunction. In any case, he

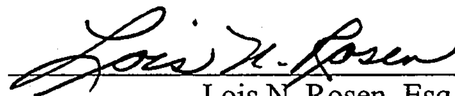
counts the cost, and assumes a liability whose maximum is a determinate amount"]). Having elected not to perfect its appeal on these issues, it is now bound by its prior litigation conduct. It cannot now simply ask the Court for a "do over" with no legitimate procedural basis therefore. To hold otherwise would unfairly subject Defendants to vexatious and meritless litigation without end.

Even if this Court refuses to grant Seven Springs the leave it seeks, it is not leaving Seven Springs without a remedy. Seven Springs may still seek damages for the alleged wrongful issuance of the preliminary injunction in *Seven Springs I*. Indeed, when *Seven Springs I* is ultimately decided on the merits, Seven Springs will surely seek to persuade the Court not only that it is entitled to an implied easement but also that the preliminary injunction should never have been granted. If Seven Springs prevails on the merits of these claims, it can then collect whatever monetary damages it can prove it actually suffered from the proceeds of the undertaking.

CONCLUSION

For the reasons set forth hereinabove and in the prior papers submitted in support of the Donohoes' motion, the Donohoes respectfully request that their motion to dismiss the Complaint be granted in its entirety and that Seven Springs' cross-motion be denied.

Dated: White Plains, New York
February 19, 2010



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

--X

SEVEN SPRINGS, LLC

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE

Defendants.

--X

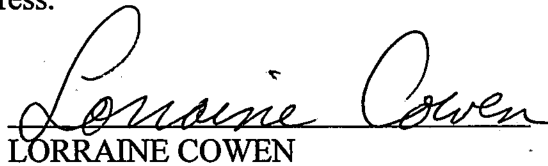
AFFIDAVIT OF SERVICE

Index No.: 21162/09

STATE OF NEW YORK)

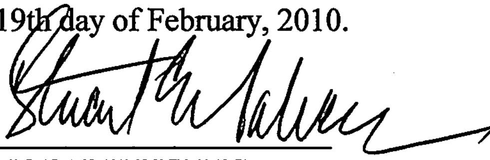
COUNTY OF WESTCHESTER) ss:

LORRAINE COWEN, being duly sworn, deposes and says: I am not a party to the action: I am over the age of 18 years old; I reside in Scarsdale, New York and on February 19, 2010, I served a copy of the within Reply Memorandum of Law in further Support of Noel B. Donohoe and Joann Donohoe's Motion to Dismiss the Complaint and in Opposition to Plaintiff's Cross-Motion upon the parties listed below annexed hereto by mailing same by overnight delivery and E-Mail. The overnight service used was Federal Express.



LORRAINE COWEN

Sworn to before me this
19th day of February, 2010.



NOTARY PUBLIC

STUART E. KAHAN
Notary Public, State of New York
No. 02KA4769001
Qualified in Westchester County
Commission Expires June 30, 2010

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ORIGINAL

FILED

JUN 25 2010

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

---X

Index No. 21162/09

Seven Springs, LLC's Reply Memorandum of Law

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AND COUNTY COURTS

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0143500-001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---X

SEVEN SPRINGS, LLC,

Plaintiff,

-against-

THE NATURE CONSERVANCY, ROBERT BURKE, TERI BURKE, NOEL B. DONOHOE and JOANN DONOHOE,

Defendants.

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Index No. 21162/09

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WESTCHESTER SUPREME AND COUNTY COURTS

SEVEN SPRINGS, LLC'S REPLY MEMORANDUM OF LAW

PRELIMINARY STATEMENT

This reply memorandum of law is respectfully submitted on behalf of Plaintiff Seven Springs, LLC in further support of its cross-motion for an order pursuant to CPLR Sections 305 and 3025(b) amending Plaintiff's Complaint, and granting Plaintiff leave to serve and file an Amended Complaint in the form annexed to Plaintiff's moving papers as Exhibit "A"; and in response to the Affirmation of Leonard Benowich, Esq., dated February 19, 2010 (the "Benowich Aff."), and accompanying Memorandum of Law, Affirmation of Lois N. Rosen, Esq. dated February 19, 2010 (the "Rosen Aff.") and accompanying Memorandum of Law, and Affidavit of Janine Mastellone, Esq. dated February 19, 2010 (the "Mastellone Aff.") and accompanying Memorandum of Law.

The facts upon which this memorandum is based are set forth in the Affidavit of Alfred E. Donnellan, Esq., sworn to January 21, 2010, with exhibits (the "Donnellan Aff.") and the Affidavit of Donald J. Trump, sworn to January 21, 2010 (the "Trump Aff."), which were

previously submitted in support of Plaintiff's cross-motion and in opposition to the Defendant's motions to dismiss and are incorporated herein by reference.[1]

Plaintiff's cross-motion should be granted, and the Defendants' motions should be denied, because the Complaint, as amended, sets forth a valid, well plead cause of action that is not time barred.

ARGUMENT

POINT I

THE AMENDED COMPLAINT SETS FORTH A VALID CAUSE OF ACTION AND PLAINTIFF'S CROSS-MOTION SHOULD BE GRANTED

As the Appellate Division recently stated:

> "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit"; *Trataros Constr., Inc. v. New York City Hous. Auth.*, 34 A.D.3d 451, 452-453, 823 N.Y.S.2d 534. Additionally, "[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt" (*Sample v. Levada*, 8 A.D.3d 465, 467-468, 779 N.Y.S.2d 96; *see Sleepy's Inc. v. Orzechowksi,* 7 A.D.3d 511, 775 N.Y.S.2d 581; *Zacma Cleaners Corp. v. Gimbel*, 149 A.D.2d 585, 586, 540 N.Y.S.2d 268). These cases make clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first instance.

Lucido v. Mancuso, 49 A.D.3d 220, 851 N.Y.S.2d 238 (2d Dept. 2008).

Moreover,

> "Defendants' purported desire to know the specific allegations as to each defendant can be sought via a demand for a bill of particulars and disclosure. Indeed, disclosure will undoubtedly

[1] Defined terms used here have the same meaning as set forth in the Donnellan Aff. unless indicated otherwise.

> result in a refining of the action. The lack of exact specificity at this procedural juncture, however, is not a ground for dismissal."

Serio v. Rhulen, 24 A.D.3d 1092, 806 N.Y.S.2d 283 (3d Dept., 2005). *See also, Pernet v. Peabody Engineering Corporation*, 20 A.D.2d 781, 248 N.Y.S.2d 132 (1st Dept. 1964) ("Vagueness or conclusory nature of certain allegations of complaint for breach of guaranty of employment contract were not such as to render complaint insufficient, and further particularity could be obtained by demand for bill of particulars or by means of disclosure proceeding. CPLR Rule 3211(a)(7); §3013"; *Kraft vs. Sheridan*, 134 A.D.2d 217, 521 N.Y.S.2d 238 (1st Dept., 1987) ("Further particularity as to the theory of recovery may be obtained by a demand for a bill of particulars (*Pernet vs. Peabody Engineering Corp.*, 20 A.D.2d 781, 782, 248 N.Y.S.2d 132 [1st Dept., 1964]").

Defendants' arguments are couched and presented as if this were a motion for summary judgment. It is not. The criteria for reviewing Plaintiff's cross-motion require that the Court take all of the Plaintiff's allegations as set forth in its Complaint (as amended) and Affidavits as true and resolve all inferences which reasonably flow therefrom in favor of Plaintiff. See, *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977). It is respectfully submitted that the Amended Complaint, together with the Trump Aff., which allege that the actions taken by Defendants are willful, malicious and are intended to deprive Plaintiff of its property rights and access to its property state a valid cause of action, which is all Plaintiff is required to do at this stage. The Court is respectfully referred to Plaintiff's opening Memorandum of Law in opposition to Defendants' Motions to Dismiss and in support of Plaintiff's Cross-Motion, pp. 4-7, which specifically addresses the elements of a prima facie tort, the allegations of the Amended

Complaint (Donnellan Aff., Ex. A, Amended Complaint ¶¶ 24-41) and the sufficiency of the allegations to support Plaintiff's claims.

As set forth above, the Plaintiff is not required to establish the merit of the proposed amendment in the first instance. See *Lucido*, supra. Defendants also object to the lack of specificity of the Amended Complaint. This assertion is unavailing. The specific allegations as to each defendant can be sought via a demand for bill of particulars and disclosure. See *Serio*, supra.

TNC asserts in its Reply Memorandum of Law (p. 4) that because it is a nonprofit organization which has as an objective "to preserve the Nature Preserve," it cannot have been motivated solely by disinterested malevolence for Plaintiff. What is clear is that TNC and the other Defendants are seeking to prevent Plaintiff from using the Easement Area, and from developing its property located in North Castle. Whether TNC has, as alleged, other motivations is not clear at this point. No discovery has taken place in this case. Accordingly, it is premature to dismiss this case, and to conclude, as a matter of law, that TNC's actions are not motivated by disinterested malevolence.

It is asserted in the Burke and Donohoe responding papers, by their attorneys, that neither the Burkes nor the Donohoes joined in the motion for the April 14, 2008 Preliminary Injunction. This claim is belied by the Reply Affirmation of John B. Kirkpatrick dated April 2, 2008, which states, in pertinent part, that:

> "This reply affirmation is submitted in support of the motion for a preliminary injunction made by co-defendant The Nature Conservancy ("TNC").
> The Individual Defendants support TNC's motion and believe that TNC is entitled to the injunctive relief that it now seeks from this Court."

See Donnellan Aff., Ex. F.

The foregoing clearly demonstrates that Burke and Donohoe did not oppose the motion, or remain neutral, and take no position, but in fact joined in the motion for a preliminary injunction. It cannot reasonably, and in good faith, be argued otherwise.

It is further argued by the Defendants that even if the Court finds that the Defendants joined in the application for injunctive relief, their statements are privileged and not actionable.

Defendants' claim of privilege misstates the law of qualified privilege, which requires that plaintiff prove malice, which it must do in any event to establish a cause of action for *prima facie* tort. Defendants' own cases make this clear. The Court of Appeals in *Park Knoll Associates v. Schmidt*, 59 N.Y.2d 205, 211, 464 N.Y.S.2d 424 (1983), relied on by defendants, held that a non-governmental litigant has only a qualified privilege in litigation matters, one that can be overcome by a showing of malice. ("It appearing that defendant can establish the interest necessary to warrant a qualified privilege here, the burden rests upon plaintiff, if it is to sustain its cause of action, to prove that she acted out of malice. The complaint here contains sufficient allegations of malice to withstand the motion to dismiss." 59 N.Y.2d at 211 [emphasis added].) Likewise, the Court of Appeals in *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 834 N.Y.S.2d 494 (2007), also relied on by defendants, stated: "Communications that are protected by a qualified privilege are not actionable unless a plaintiff can demonstrate that the declarant made the statement with malice. Malice in this context has been interpreted to mean spite or a knowing or reckless disregard of a statement's falsity..." 8 N.Y.3d at 365 [emphasis added].).

Other cases cited by defendants do not declare, as claimed, that a party's actions in private litigation are absolutely privileged and cannot form the basis for a *prima facie* tort. Rather, they are consistent with the holdings quoted above. *Lerwick v. Kelsey*, 24 A.D.3d 931,

807 N.Y.S.2d 147 (3rd Dept. 2005), did not, as defendants claim, have anything to do with absolute privilege; it concerned qualified privilege, and held that the allegations were insufficient to show that malevolence was the only factor leading to an employees' termination. *Arts4All, Ltd. v. Hancock*, 5 A.D.3d 106, 773 N.Y.S.2d 348 (1st Dept. 2004), also relied on by defendants, held that although a witness' statement was qualifiedly privileged, "plaintiffs can defeat this qualified privilege by showing that defendant spoke with malice." 5 A.D.3d at 109.

It should be noted too that if as a general matter a plaintiffs' conduct in litigation were absolutely privileged, there would be no cause of action for malicious prosecution. There is, of course, such a cause of action. See, *Dudick v. Gulyas*, 277 A.D.2d 686, 716 N.Y.S.2d 407 (3rd Dept. 2000).

It is asserted that Seven Springs' claim that "the only viable access to the Seven Springs Parcel is from the south via lower Oregon Road" is untrue, and that "a connection with Sarles Street was 'viable' originally." Rosen Aff. (at p. 11, fn 6) This assertion is misleading and conveniently omits the entire allegation of the Amended Complaint (¶ 25) and Donnellan Aff. (¶ 34.) The Donnellan Aff. states (at ¶ 34) that

> "It is asserted in TNC's Memorandum of Law (at page 11) that "the Complaint does not allege that 'secondary access' must be over Oregon Road". There is no requirement that Plaintiff allege that secondary access must be over Oregon Road to state a cause of action against the Defendants. The Defendants are precluding Plaintiff from exercising its property rights over the Easement Area. By precluding the Plaintiff from exercising its property rights over the Easement Area Plaintiff is being denied a valuable property right and is being damaged on a continuous basis. Notwithstanding the foregoing, the Complaint and Amended Complaint allege that "the only means by which access can be had to any public highway, street, road or avenue from the Seven Springs Parcel to the south is via the road known as Oregon Road". Furthermore, the only viable secondary access to the Seven Springs Parcel is from the south. Accordingly, as a practical matter, access

> to the Seven Springs Parcel from the south must be over Oregon Road. By precluding Plaintiff from accessing the Seven Springs Parcel over Oregon Road the Defendants are preventing Plaintiff from using the only access route available to Plaintiff based upon its claimed Easement rights."

As the foregoing demonstrates, the issue is access to the North Castle portion of the Seven Springs Parcel from the south over Plaintiff's claimed easement rights. Access over Sarles Street to the North Castle portion of the Seven Springs Parcel is from the north and is irrelevant.

Defendants refer to development of the portion of the Seven Springs Parcel in Bedford to support their assertion that Plaintiff has not suffered damage as a result of Defendants' actions. This is a red herring. The Seven Springs Parcel is located in New Castle, North Castle and Bedford. (Trump Aff. ¶ 3.) Plaintiff's damages arise out of its inability to develop the entire Seven Springs Parcel, including that portion of the Seven Springs Parcel located in North Castle, and having to travel greater distances to the north to access the Seven Springs Parcel. (Trump Aff., ¶¶ 20 and 21.) These damages arise directly from Plaintiff's being precluded from exercising its full right to ingress and egress over the Easement. Further, and critically, as a result of Plaintiff's being deprived of its right to access the Easement, Plaintiff has no current application pending to develop the portion of the Seven Springs Parcel located in North Castle. (See Trump Aff., ¶ 20.)

Moreover, Defendants' actions in precluding Plaintiff from exercising its property rights over the Easement Area are causing damage to Plaintiff without regard to Plaintiff's development of the Seven Springs' Parcel. Plaintiff has stated a valid cause of action for an implied Easement over Oregon Road. As more particularly set forth in the Trump Aff. and the proposed Amended Complaint, the Seven Springs Parcel contains, among other things, a manor house that is located

in North Castle that is approximately 90 years old. The house is the private dwelling of Donald Trump and his family.

As a result of the Defendants' actions, Plaintiff, Plaintiff's visitors, tradespeople, emergency vehicles and the residents of the manor house are inconvenienced and deprived of the benefit of the Easement, and, more particularly are required to travel significantly greater distances to the north to access the Seven Springs Parcel. (See Donnellan Aff., ¶¶ 34, 35 and 36.)

The Burke and Donohoe Defendants assert that they have a valid defense based upon a twenty-five foot road-widening easement that had been reserved by Realis Associates. (See Rosen Aff., ¶ 35 and Mastellone Memo of Law, p. 9.) This assertion is without merit. The Donohoe Deed and Burke Deed, under which each Defendant acquired title to their respective properties, state that "No right title or interest into any of the roads abutting the premises herein are included" in the conveyance, and that the conveyance is subject to a road widening easement for the future widening of Oregon Road approximately 25 feet in width. (See Donnellan Aff., Exhibits "H" and "I".) Based on the foregoing, the Defendants have no valid basis in law or fact to prevent, or attempt to prevent, Plaintiff from having unobstructed access over Oregon Road or the Easement Area. (See Amended Complaint, ¶¶ 46 and 47.)

Defendants' assertion that this is a SLAPP suit is likewise without merit. Not surprisingly, the Defendants do not address or respond to the fact that this action does not fall within the parameters of the applicable statute because Plaintiff's underlying claims, as more particularly set forth in the 2006 Action, involve a dispute between private parties to the Easement Area, and as there is not current application pending to develop the portion of the

Seven Springs Parcel in North Castle, Plaintiff is not a "public applicant or permitee" under the statute. (See Plaintiff's Memorandum of Law, p. 9.)

Defendants' further assert that Plaintiff's proposed Amended Complaint fails to allege special damages as required for the cause of action of prima facie tort. This assertion is likewise unavailing.

Special damages must be alleged with sufficient particularity to identify actual losses and be related causally to the tortious acts. *Epifani v. Johnson*, 65 A.D.3d 224, 233, 882 N.Y.S.2d 234 (2d Dept. 2009) and cases cited. Case law, however, does not identify the level of pleading specificity required. Here, the alleged damages cannot be a surprise to Defendants, nor can they at this stage be usefully stated other than in round figures. Quite simply, they are the economic loss caused by Defendants' intentionally thwarting plaintiff's development of the entire Seven Springs Parcel, and in particular that portion of the Seven Springs Parcel located in North Castle, and by Plaintiff being precluded from exercising its full right to ingress and egress over the Easement. They are both obvious and capable of more precise calculation by a fact-finder at any time. For Defendants to pretend they do not have adequate information or notice as to how their impeding Plaintiff's access to Plaintiff's property via the Easement has directly caused, and continues to cause, damage to Seven Springs is play-acting. Harming, indeed terminating further development of the Seven Springs Parcel or use by Plaintiff of the Easement is exactly what Defendants have sought to accomplish. In any event, should the Court find that more specificity is required, the appropriate remedy is disclosure. See, *Serio v. Rhulen*, supra.

Furthermore, Defendants intentional conduct in preventing and obstructing the Plaintiff's use of the Easement is a flagrant interference with Plaintiff's rights entitling Plaintiff to punitive damages. The Court is respectfully referred to Plaintiff's opening Memorandum of Law in

opposition to Defendants' Motions to dismiss and in support of Plaintiff's cross-motion, pp. 11-13, which specifically address Plaintiff's right to punitive damages in this case.

Finally, contrary to the assertions in the Defendants' opposition papers Plaintiff is not precluded from asserting its right to damages until the court renders a final determination as to the rights of the parties with respect to the Easement. If this were the case, a party would be precluded from asserting a right to damages until liability is found. There is no support for such a proposition.

Based on the foregoing, it is respectfully submitted that the Amended Complaint sets forth a valid cause of action and Plaintiff's cross-motion should be granted.

POINT II

PLAINTIFF'S ACTION IS TIMELY

Defendants' assertion regarding this case being time barred are likewise without merit. As more particularly set forth in Plaintiff's opening Memorandum of Law, a cause of action for prima facie tort is governed by a three year statute of limitations where the injury is essentially to the Plaintiff's economic interests rather than to their reputation. See *Jemison v. Crichlaw*, 139 A.D.2d 332, 531 N.Y.S.2d 919 (2d Dept., 1988). Defendants' attempt to distinguish *Jemison* by asserting that Plaintiff's claim is for slander of title, which is subject to a one year statute of limitations, is unavailing. This case seeks monetary damages as a result of Defendants' continuing actions in precluding Plaintiff's use of the Easement Area, which have resulted in economic injury to Plaintiff by, among other things, preventing and/or delaying development of the portion of the Seven Springs Parcel located in North Castle, and diminution in value of the Seven Springs Parcel by Plaintiff being precluded from accessing the Seven Springs Parcel from the south. Defendants' attempt to limit Plaintiff's claim to a one year statute of limitations is not

supported by the allegations of the Amended Complaint and, in any event, is inappropriate in the context of a motion to dismiss.

Furthermore, Defendants' continued action in depriving Plaintiff of its rights to the Easement Area gives rise to continuous causes of action against the Defendants. (See Plaintiff's Memorandum of Law, p. 10.)

Finally, and contrary to the Defendants' assertions, an amended pleading in a subsequent action can be deemed to relate back to the commencement of a separate prior action. See, *Town of Guilderland v. Texaco Refining and Marketing, Inc.*, 159 A.D.2d 829, 552 N.Y.S.2d 704 (3d Dept. 1990) (it is permissible to relate back to the original commencement of the action not only a claim the Plaintiff seeks to add in the same action, but even one sought to be added to a separate but connected action) and Plaintiff's opening Memorandum of Law, p. 11. The 2006 Action involves the same parties to this action and clearly, and admittedly, gives notice of the transactions and occurrences out of which the claims in this action arise[2].

Based upon the foregoing, this action is timely.

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[2] See December 11, 2009 Rosen Aff. (¶ 4) ("This is the third in a series of lawsuits that Seven Springs has commenced with respect to its claim that it possesses easement rights over a portion of a road known as Oregon Road in the Town of North Castle. In the first action, which was commenced in or about May 2006, Seven Springs brought suit against TNC, the Town of North Castle (the "Town"), Realis Associates, the Burkes, and the Donohoes, and asked the Court *inter alia*, for a declaratory judgment as to its rights with respect to the lower portion of Oregon Road..."; TNC Memorandum of Law dated November 16, 2009 in support of motion to dismiss (p. 2) ("This is the second action that Plaintiff has commenced against these Defendants, but it is the third action commenced by Plaintiff concerning Oregon Road. In the first action, *Seven Springs, LLC v. The Nature conservancy, et al.*, Index No. 9130/06 ("*Seven Springs I*"), Seven Springs seeks a declaration that it has an easement over a portion of Oregon Road in the Town of North Castle, including over land that is owned by TNC"); Burke Memorandum of Law dated December 2, 2009 in support of motion to dismiss (p. 2) ("On or about May 15, 2006, the plaintiff commenced an action pursuant to Article 15 of the Real Property Action and Proceedings Law to compel a determination of claims relative to real property, described and known as Oregon Road, located in the County of Westchester..." (See also, Donnellan Aff. ¶¶ 9, 10 and 27, and Plaintiff's Memorandum of Law, p. 11.)

POINT III

SEVEN SPRINGS, LLC IS NOT COLLATERALLY ESTOPPED FROM ASSERTING ITS CLAIMS IN THIS ACTION

Seven Springs' action for *prima facie* tort is authorized by CPLR 6315:

> **"CPLR 6315: Ascertaining damages sustained by reason of preliminary injunction or temporary restraining order**
>
> The damages sustained by reason of a preliminary injunction or temporary restraining order may be ascertained upon motion on such notice to all interested persons as the court shall direct. Where the defendant enjoined was an officer of a corporation or joint-stock association or a representative of another person, and the amount of the undertaking exceeds the damages sustained by the defendant by reason of the preliminary injunction or temporary restraining order, the damages sustained by such corporation, association or person represented, to the amount of such excess, may also be ascertained. The amount of damages so ascertained is conclusive upon all persons who were served with notice of the motion and such amount may be recovered by the person entitled thereto in a separate action."

Where there is a showing of bad faith amounting to malicious prosecution, or where the application for the judicial restraint was maliciously motivated, damages from an improperly issued injunctive relief can be recovered in a separate action. See, *General Elec. Co. v. Metals Resources Group Ltd.*, 293 A.D.2d 417, 419, 741 N.Y.S.2d 218 (1st Dept. 2002); *Crown Wisteria, Inc. v. F.G.F. Enterprises Corp.*, 168 A.D.2d 238, 241, 562 N.Y.S.2d 616 (1st Dept. 1990); *Brooklyn Consol. Lumber Corp. v. City Plastering Co.*, 236 A.D. 799, 259 N.Y.S. 561 (2nd Dept. 1932); Siegel, *New York Practice* § 329 (4th ed.). CPLR 6315 is the procedural vehicle for recovering those damages. In such a proceeding, the damages awarded may exceed the amount of the undertaking of the party that obtained the injunction. *A & M Exports, Ltd. v. Meridien Intern. Bank, Ltd.*, 222 A.D.2d 378, 380, 636 N.Y.S.2d 35 (1st Dept. 1995); *Doran & Associates, Inc. v. Envirogas, Inc.*, 112 A.D.2d 766, 768, 492 N.Y.S.2d 504 (4th Dept. 1985). Indeed, CPLR 6315 does not by its terms limit damages to the amount of the bond or

undertaking. Further, an award of damages may include attorneys' fees. *Shu Yiu Louie v. David & Chiu Place Restaurant, Inc.*, 261 A.D.2d 150, 152, 689 N.Y.S.2d 476 (1st Dept. 1999); *A & M Exports, Ltd. v. Meridien Intern. Bank, Ltd.*, 222 A.D.2d 378, 380, 636 N.Y.S.2d 35 (1st Dept. 1995).

Seven Springs thus appropriately brought this action for *prima facie* tort. The elements of the cause of action require a showing that "disinterested malevolence," or malice, was the sole motivation for defendants' conduct. *Epifani v. Johnson*, 65 A.D.3d 224, 822 N.Y.S.2d 234 (2nd Dept. 2009). The issuance of a preliminary injunction against Seven Springs in the 2006 Action did not determine whether those who sought the injunction were maliciously motivated. Indeed, whether Defendants' actions in obtaining the injunction, though lawful, were motivated only by their unjustified intention to harm Seven Springs – which is the essence of the claim here, *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143, 490 N.Y.S.2d 735 (1985) – was not before the Court. Likewise, the Court could of course not have determined previously whether Seven Springs suffered special damages as a result of the injunction.

Defendants' reliance on *Blue Chip Mortg. Corp. v. Strumpf*, 50 A.D.3d 936, 937, 857 N.Y.S.2d 607 (2nd Dept. 2008), *Bonded Concrete, Inc. v. Town of Saugerties*, 42 A.D.3d 852 (3d Dept. 2007), and related cases, to support the assertion that Plaintiff is barred from asserting its claims in this action, and is limited in its recovery to the amount of the undertaking, or $100,000.00, is misplaced. Plaintiff's claim in this action is supported by CPLR §6315 and, in any event, the issues sought to be raised in this action, namely Defendants' tortious acts, were not before the Court in the 2006 Action.

The Burke and Donohoe Defendants claim that Plaintiff's damages claim is limited to the amount of the undertaking, with respect to them. This is inconsistent with their position that they

did not join in the application for the injunction. If these Defendants did not join in the application for the injunction in the 2006 Action, then Plaintiff's recovery against these Defendants cannot be limited to the amount of the undertaking given with respect to the injunction.

Based upon the foregoing, Seven Springs is not collaterally estopped from asserting a claim for damages relative to the issuance of the preliminary injunction in the 2006 Action, and Seven Springs' right of recovery is not limited to the amount of the undertaking as fixed by the Court in the 2006 Action.

CONCLUSION

WHEREFORE, for the reasons set forth herein, it is respectfully submitted that Plaintiff's cross-motion should be granted in its entirety and Defendants' motions should be denied in their entirety, together with such other and further relief as the Court may deem just and proper.

Dated: White Plains, New York
March 5, 2010

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<u>**AFFIDAVIT OF SERVICE**</u>

STATE OF NEW YORK)
)ss:
COUNTY OF WESTCHESTER)

CHRISTINE WILLIAMS, being sworn says:

I am not a party to the action, am over 18 years of age and reside at White Plains, New York (office).

On March 5, 2010, I served a true copy of the annexed **Reply Memorandum of Law** in the following manner:

by transmitting the same by email to the email address below which was provided by such attorney,

by mailing the same in a sealed envelope, with postage prepaid thereon, in an official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressees as indicated below:

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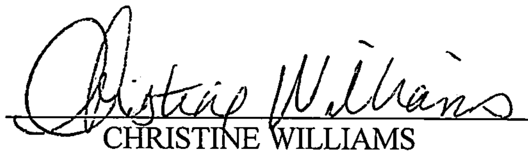

CHRISTINE WILLIAMS

Sworn to before me this
5th day of March, 2010.

NOTARY PUBLIC

BRADLEY D. WANK
Notary Public, State of New York
No. 60-4829597
Qualified in Westchester County
Commission Expires Dec. 31, 2013